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MIDDLE TEMPLE

LEADING CASES

IN

MODERN EQUITY.

LEADING CASES
IN
MODERN EQUITY.

BY

(THE LATE)

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MIDDLE TEMPLE

FOURTH EDITION

BY

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LONDON:
WILLIAM CLOWES AND SONS, LIMITED,
7, FLEET STREET.
1902.

BY SAME AUTHOR.

Second Edition (1891). *Demy 8vo, 2 vols., cloth,* 38*s.*
Cash Price, 30*s.* (*Postage,* 1*s.*)

COMMENTARIES

ON THE

PRESENT LAWS OF ENGLAND.

BY THE LATE THOMAS BRETT,

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⁂ The main idea of this book is to bring into special prominence the present and living law, and only to deal with past law, or that which is practically obsolete, so far as it is necessary to enable the reader to understand the present.

OPINIONS OF THE PRESS.

"We are glad to observe in the present edition the marks of careful revision. . . . It is a comprehensive outline of existing English law contained in a marvellously small compass, well arranged, and so contrived, by the insertion of illustrative cases and extracts, as to be interesting instead of repulsive to the student."—*Solicitor's Journal.*

"The success which we predicted for this book on its first appearance, only a year ago (1890), seems to be now fully assured, for we already have before us a second edition."—*Law Journal.*

LONDON: WILLIAM CLOWES & SONS, LIMITED,
LAW PUBLISHERS, 7, FLEET STREET, E.C.

PRINTED BY WILLIAM CLOWES AND SONS, LIMITED, LONDON AND BECCLES.

PREFACE TO THE FOURTH EDITION.

The first edition of this work appeared in 1887, and the second in 1891. Shortly afterwards the author died, and the preparation of a third edition in 1896 was confided to Mr. J. M. Dixon and myself.

In the second edition there had been 74 leading cases, admirably chosen, but ungrouped. Of these, 65 were retained, and to these three were added in the third edition, and the leading cases were grouped so as to suggest a coherent system of law. Of some 1400 minor cases—many of which were of very minute interest—150 or so were rejected, and to these 1200 or so were added in the third edition. Revision and rewriting were necessary on a very considerable scale.

In this edition 67 of the 68 leading cases of the third edition reappear. *Wright* v. *Horton*, having played its part, disappears. The second case of *Ewing* v. *Orr Ewing*, *Bruce* v. *Marquess of Ailesbury*, *Cooper* v. *C.*, *Codrington* v. *C.*, *Maddison* v. *Alderson*, and *Salt* v. *Marquess of Northampton* have been promoted from small to large type. The framework of the third edition is almost unchanged. About 20 minor cases disappear, and about 1500 are added. There are now about 4100 minor cases against Mr. Brett's 1400, and the plan which was partly carried out in 1896 has been pursued in a more thorough manner, and has assumed, it is hoped, a more durable shape.

That plan has been to revise every reference, case, and criticism, and to add every recent case which affected any case already in the book. If these recent cases rendered the existing edifice top-heavy, the foundations had to be widened and deepened with the help of older cases. My object has been to accentuate the outlines of every paragraph, and to make every chapter deal completely with its subject, and thus to fulfil Mr. Brett's ideal of spelling out an intelligible system of equity from the case-law of thirty years or so, ancient cases, and cases on pure construction, being, like statute law, only admitted where they could not be excluded. No other case of present interest has been burked. Such a book should be of some use to practising lawyers, as well as for the educational purposes for which it is primarily intended.

I must add a word or two of warning. It is obvious that a system of equity recreated out of present case-law must be eclectic. Much is omitted. Even White and Tudor is far from exhaustive. Again, this book does not compete nor collide with any other book. It simply presents in its own way the equitable system of to-day as it strikes a contemporary who believes heart and soul that case-law is the living self-created being to which statute law furnishes sometimes a mirror, sometimes a crutch, or sometimes some other external help. Again, in case the question—not unknown in the Chancery Courts—should be raised, Has the book been "reconstructed" or only "altered"? I should answer that opinions might differ, but that my opinion is that the edition of 1896 meant reconstruction, and that this edition means alteration, although even in this edition many chapters, notably the first, have been entirely rewritten.

Again, brevity has been much studied: thus I mark with an asterisk (*) minor leading cases on some special point: such cases (if I may mention those of the last three years) as the *Taff Vale Railway* Case, *Quinn* v.

Leathem, *Barnett* v. *Howard*, *Biggs* v. *Hoddinott*, *Oliver* v. *Hinton*, *In re Wrexham Railway Co.* Other cases containing useful reviews of cases by judges, among whom Stirling, J., now L.J., is pre-eminent, or containing references to cases not noticed in this book, are decorated with a dagger (†). Such cases, though invaluable to the practising lawyer, are by no means leading cases. The most recent instances of this type are *In re Game* and *Taylor* v. *London and County Banking Co.* The asterisked cases are turning-points, the daggered cases meeting-places, in the history of equity. My asterisks and daggers are not meant to be exhaustive.

I can only appeal to my readers to criticise with indulgence a task of the difficulties of which I am acutely conscious.

J. D. ROGERS.

8, Stone Buildings, Lincoln's Inn,
December 16, 1901.

EXTRACT FROM PREFACE TO FIRST EDITION.

The object which I have had in view in writing this book is to illustrate, by means of leading cases, the doctrines of "modern Equity." That great judge, Sir George Jessel, in his celebrated judgment in *In re Hallett's Estate* (13 Ch. D. 710), . . . pointed out that the moment the fiduciary relation was established between the parties, that moment the "modern doctrines of equity" applied. "I intentionally," the judgment proceeds, "say modern rules, because it must not be forgotten that the rules of Equity are not, like the rules of the Common Law, supposed to have been established from time immemorial. No doubt they were invented for the purpose of securing the better administration of justice, but still they were invented. Take such things as these—the separate use of a married woman, the restraint on alienation. We can name the Chancellors who first invented them, and state the date when they were first introduced into Equity jurisprudence, and therefore in cases of this kind the older precedents in Equity are of very little value. The doctrines are progressive, refined, altered and improved; and if we want to know what the rules of Equity are, we must look, of course, rather to the more modern than the more ancient cases."

To this it may be added, that the great changes which have been introduced by recent statutes and orders into the principles and practice of Equity have still further diminished the value of the "older precedents," and in many cases have rendered them practically obsolete. Thus, to cite only two illustrations from among several which might be mentioned. Ever since 1879, when the late Master of the Rolls delivered his judgment *Re Hallett's Estate*, the old principles of the law as to restraint on anticipation have been greatly modified by the *Conveyancing Act*, 1881. Within the last few years the old practice as to administration has been revolutionized by the Orders under the *Judicature Act*.

Reasons such as these would seem amply sufficient to justify the appearance of a new volume dealing professedly with "modern Equity." Thus far as to the substance of the work. A word now as to its form. The form of leading cases has been selected as best calculated to interest the reader, and impress the modern doctrines on the minds alike of students and practitioners.

I desire to express my warmest acknowledgments to Mr. J. Pickup and Mr. J. M. Dixon, of 6, Stone Buildings, Lincoln's Inn, for their most valuable assistance throughout the whole of this book, and also to Mr. William Tucker and Mr. J. W. Blagg, for friendly aid rendered in respect of portions of it, and to submit my work to the favourable consideration of the profession to which I have the honour to belong.

THOMAS BRETT.

LINCOLN'S INN,
July, 1887.

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ADDENDA.

Page 13, line 9, *after* “*Soar* v. *Foster*” *add* “*In re a policy* ([1901] W. N. 249).”

„ 105, „ 13, *add* “See too *In re Latham* ([1901] W. N. 248) (annuities).”

„ 108, „ 16, *after* “*In re Hancock*” *add* “affirmed ([1901] W. N. 246).”

„ 138, „ 33, *add* “See *In re Helyar* ([1901] W. N. 248).”

„ 180, „ 7 from bottom, *add* “*Evans-Williams* v. *Byron* (18 T. L. R. 172).”

„ 206, „ 25, *after* “*In re Swain*” *add* “*In re Timmis* ([1901] W. N. 242).”

„ 267, „ 25, *after* “*Rice* v. *Noakes*” *add* “affirmed ([1901] W. N. 247).”

„ 360, „ 12 from bottom, *add* “Lord Macnaghten questioned these cases in *Noakes* v. *Rice* (*Times*, December 18, 1901).”

„ 379, „ 7, *add* “*Home & Colonial Stores* v. *Colls* (*Times*, December 21, 1901).”

„ 380, „ 30, *add* “*East Fremantle* (*Mayor, etc.*) v. *Annois* (*Times*, December 23, 1901).”

MIDDLE TEMPLE

LEADING CASES
IN
MODERN EQUITY.

Equity acts in personam, when convenient.

EWING *v.* ORR EWING.

(22 Ch. D. 456.)
(9 App. Ca. 34.)
(10 App. Ca. 453.)

Principle.

Equity acts in personam, that is to say, the Court has a personal jurisdiction to enforce contracts and trusts. But it will not exercise this jurisdiction if "inconvenient."

Summary of facts.

A testator domiciled in Scotland left personal estate in Scotland over £400,000 and in England about £25,000, and heritable property in Scotland, and he made his will in Scotch form and appointed six Scotchmen (two or three of whom resided in Scotland) to be his executors and trustees. The executors obtained confirmation (probate) of the will in Scotland, which was sealed by the English Court.

An infant legatee resident in England brought an action for the administration of the estate against the executor-trustees: the Scotch trustees entered an appearance without protest; but before trial all the English personalty was removed into Scotland. The House of Lords held that the English Court had jurisdiction as to the whole estate, and ordered administration.

A year later the House of Lords held that it would be inconvenient to exercise this jurisdiction, as a similar action had been brought in Scotland, and proceedings in the English action were stayed.

Forum competens.

Courts of Equity disregard local distinctions, being "Courts of conscience operating *in personam* and not *in rem;* and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilii* within their jurisdiction (9 A. C. 40). Therefore, though Scotland is technically a foreign country, and the trustees and executors were technically foreigners (10 A. C. 521, but see 22 Ch. D. 464), the Court regarded England as the *forum competens* because plaintiffs and defendants resided in or submitted to the jurisdiction.

The trusts being Scotch, the Court would obtain (22 Ch. D. 465), and however obtained (9 A. C. 48) would obey Scotch judgments on particular points (*e.g.* as to testamentary capacity, form, construction, and succession), this being a principle of private international law, to which equity only makes an exception in the case of lunatics and infants: thus the lunacy Court, being equitable, will refuse to vest English personalty of a French lunatic living in France in his French Committee (or *tuteur*, &c.) unless satisfied that such personalty is required for the lunatic's maintenance—*In re Brown* ([1895] 2 Ch. 666); *In re Linden* ([1897] 1 Ch. 453); *In re Knight* ([1898] 1 Ch. 257); *Didisheim* v. *London and Westminster Bank* ([1900] 2 Ch. 15); *Thiery* v. *Chalmers* ([1900] 1 Ch. 80)—or benefit: *New York Sec. Co.* v. *Keyser* ([1901] 1 Ch. 666). As with lunatics, so with infants: *In re Chatard's S.* ([1899] 1 Ch. 712). As for foreign creditors see *infra*, pp. 327, 328.

Forum conveniens.

But there was another question. Was the *forum "conveniens"?* If the trustees who were served in Scotland had applied to set aside service it is probable; if a similar suit had been pending in Scotland, it is certain that the Court would have stayed proceedings on the ground that the *forum* was not *conveniens.* The second contingency occurred a year later, when the Court of Sessions granted an interlocutor for the sequestration (order for administration) of testator's estate, and appointed a judicial factor (receiver): and the infant plaintiff undertook to become a party to this new suit. The House of Lords decided that Scotland was the *forum conveniens* for three reasons: the trusts were Scotch in form, testator was Scotch, and the whole trust estate was then in Scotland. Owing to the first two reasons, Scotch law must decide questions arising on the execution and terms of the settlement, and on testator's capacity. The third reason also meant a saving of expense if action were brought in Scotland (10 A. C. p. 516). The House did not decide which of these reasons was paramount. It did decide that because a foreign country was, England was not the *forum conveniens*, and assumed that proceedings in the leading case would be stayed. It should be noted that the ground taken was not that that Court which was first seized of the case had the prior right—a ground often urged, *Norton* v. *Florence Land Co.* (7 Ch. D. 332, 337); *Moor* v. *Anglo-Italian Bank* (10 Ch. D. 681, 691); *In re De Penny* ([1891] 2 Ch. 63, 71), but here and in *Bailey* v. *Edwards* (3. Sw. 703) overruled.

These principles compared to four other principles.

The principle of the leading case affords comparison with and contrast to I. the principles on which the Probate Division acts in granting probate, II. the principles on which foreign property is subjected to English Death Duties, III. the principles of the Bankruptcy Court, IV. the principles of Common Law as to transitory and local actions.

I. Probate principle of principal and ancillary administration,

I. The general rule as to appointing legal personal representatives of the English personalty of a foreign testator where he does not, as *In the Goods of Murray* ([1896] 1 P. 65), make different wills for different countries, was stated thus by Lord Penzance: "I have before acted on the general principle that where the Court of the country of the domicile of the deceased makes a grant to a party who then comes to this Court and satisfies it that by the proper authority of his own country he has been authorized to administer the estate of the deceased I ought without further consideration to grant power to that person to administer the English assets:" *In re Hill* (L. R. 2 P. & M. 90); *In re Black* (13 P. D. 5). The English Court grants ancillary probate to the foreign executor on the strength of the principal probate which he has already acquired in testator's domicile. In doing so it does homage to the principle *mobilia sequuntur personam:* the law of testator's domicile determines to whom and in what form the assets shall be transferred, and the transfer is perfected by the law of the locality of the assets. See *Dulaney* v. *Merry* ([1901] 1 Q. B. 536)†, *infra*, p. 62. In the leading case the executors, having proved the will in Scotland, sealed it in England (sealing being equivalent under 21 & 22 Vict. c. 56 to ancillary probate), and its effect being "merely to complete the title of the executors to represent their testator within the jurisdiction *in mobilibus*" (9 A. C. 38).

and of principal and ancillary winding-up

Similarly ancillary orders are made to wind up foreign companies having offices or doing business in England: *In re Commercial Bank of India* (6 Eq. 517); *In re Matheson Bros.* (27 Ch. D. 225); *In re Commercial Bank of South Australia* (33 Ch. D. 174); *In re Mercantile Bank of Australia* ([1892] 2 Ch. 204); *In re Federal Bank of Australia* (62 L. J. Ch. 561).

scarcely apply to equitable Court.

Similarly an attempt was made in the l.c. to apply the words of Lord Westbury, "the administration of the personal estate of a deceased person belongs to the Court of the country where the deceased was domiciled at his death," *Enohin* v. *Wylie* (10 H. L. C. 1, 15), to administration actions; but Lord Westbury's dictum was overruled. In an administration action where there are no trusts there is a certain analogy to principal and ancillary probate: thus the Court will order a personal representative appointed for English assets to pay over net English assets (unless actually sued for by beneficiaries) to the foreigners who have taken out general probate; and *vice versâ*, *Eames* v. *Hacon* (18 Ch. D. 347). But this is only "as a general rule" true (*ib.* 351), and "the question whether the Court of the country where ancillary administration is granted ought to decree final distribution of the assets or to remit the property to the *forum* of the domicile of the party deceased is treated not so much as a matter of jurisdiction as of judicial discretion:" Story's Equity Jurisprudence, sect. 589 (2nd Eng. ed. p. 388), cited by Lord Selborne (10 A. C. 514). Perhaps a similar rule holds in case of concurrent bankruptcies in different countries: *In re Artola Hermanos* (24 Q. B. D. 640). But this rule does not apply to administrations where there are trusts, except as follows:—

In an administration action where there are charitable trusts to be performed the Court has delegated the preparation of a scheme to the Courts of the country, *In re Fraser* (22 Ch. D. 827), or even paid the money to charitable persons on their undertaking to render accounts, *A. G.* v. *Sturge* (19 B. 597)†; *In re Geck* (69 L. T. 819), otherwise all or none of the trusts must be administered, for trusts are indivisible: *Innes* v. *Mitchell* (4 Dr. 98); *Hope* v. *Carnegie* (1 Ch. 320); *In re Lord and Fullerton's C.* ([1896] 1 Ch. 228). Therefore equity attaches very little importance to considerations as to testator's or settlor's domicile which are vital where principal probate is granted, or to considerations as to the locality of this or that asset, which are vital where ancillary probate is granted. Settlor's domicile and the locality of assets were two of the three tests used in *Ewing* v. *Orr Ewing* (10 A. C. 516) in deciding the issue, Is England the *forum conveniens*?

II. Death duties.

II. Probate duty was superseded in 1894 by estate duty, which is payable where legacy or succession duty is payable (Finance Act, 1894, sect. ii. sub-sect. ii.).

Probate-

Assets covered by the grant of probate, *i.e.* assets within the jurisdiction, were alone liable to probate duty. As in ancillary probate, so here, locality of assets was the only consideration: *In the Goods of Ewing* (6 P. D. 19, 23) (foreign partnerships and shares); *C. S.* v. *Hope* ([1891] A. C. 476); *Stern* v. *The Queen* ([1896] 1 Q. B. 211) (foreign share-certificates transferable here). Compare *C. I. R.* v. *Muller* ([1901] A. C. 217, 237) (stamp duty on foreign goodwill); *Ld. Sudely* v. *A. G.* ([1897] A. C. 11); *In re Smyth* ([1898) 1 Ch. 89) (proceeds of sale of foreign mortgages, etc.).

Legacy-

All Englishmen's—no foreigners'—wills pay legacy duty. As in principal probate, so here, testator's domicile (or *mobilia sequuntur personam*) is the only consideration: *Wallace* v. *A. J.* (1 Ch. 1, 6); *Forbes* v. *Steven* (10 Eq. 178); *Lawson* v. *C. I. R.* ([1896] 2 Ir. R. 418) (foreign mortgages).

Succession-duty.

Succession duty is payable if "the forum for deciding upon the claim of the 'beneficiaries' is a British Court," *In re Cigala's S. T.* (7 Ch. D. 351, 357), or if the beneficiary who succeeds "becomes entitled by virtue of the laws of this country," *Wallace* v. *A. G.*, 1 Ch. 1, 7, 9), or, in other words, if England is the *forum competens et conveniens* for establishing his claim. In *A. G.* v. *Jewish Colonial Ass.* ([1901] 1 Q. B. 123)* neither settlor, nor settled personalty, nor beneficiaries were English; yet because the trustees were a company resident in London, and incorporated under the Companies Acts, 1862–90, and because the settlement was English in character, duty was payable. It would seem that the English character of the settlement—Lord Selborne's third test in *Ewing* v. *Orr Ewing* (10 A. C. 516)—is the decisive factor in deciding which forum is convenient as well as competent. If settlor relies mainly, but not exclusively, on English law, the Courts will justify his reliance, but will make him pay for it. But the fourth test—residence in England by all or, as in *Cigala's S. T.*, most of the trustees—is also vital, as we shall see. Compare *post*, p. 187.

Cases on succession duty strike the keynote of those cases which establish what forum is convenient as well as competent in the eyes of equity.

III. & IV. At common law local forum decides local and mixed actions.

III. & IV. At common law actions are transitory, such as actions on tort or contract; or local, such as actions of ejectment from land: a distinction which did not depend on obsolete technical laws of venue, and has therefore survived the Judicature Acts: *British S. Africa Co.* v. *Companhia de Moçambique* ([1893] A. C. 602). In this case s. 554 of Story's Conflict of Laws—"By the common law personal actions, being transitory, may be brought in any place where the defendant can be found; real actions must be brought in the *forum rei sitæ*, and mixed actions," such as "actions for trespasses and injuries to real property" (including leaseholds), also "in the place *rei sitæ*"—was cited and applied.

In equity local rights prevail in land questions whether English

Equity, too, admits that rights over land are created and transmitted by instruments which conform to the *lex situs*. Thus a Frenchman's will must conform to English law in order to pass the equitable right to realty: *Freke* v. *Carbery* (16 Eq. 461) (Thelusson Act); *Duncan* v. *Lawson* (41 C. D. 394) (Mortmain); *Pepin* v. *Bruyère* ([1900] 2 Ch. 504); ([1901] W. N. 209) (Wills Act, 1837); otherwise the Frenchman's executor, after taking out ancilliary probate in England, will be trustee thereof for testator's heir or next of kin. So, too, the Frenchman's ante-nuptial contract must be binding according to English law, in order to bind English land in equity: *In re De Nicols* ([1900] 2 Ch. 410) (husband and wife).

or foreign;

Conversely, as in bankruptcy, *Cockerell* v. *Dickens* (3 Mo. P. C. 98, 133, 134); *In re Artola Hermanos* (24 Q. B. D. 640), so in Equity, equities which do not affect land by virtue of the *lex situs* are regarded as null and void, so far as the land is concerned: *Waterhouse* v. *Stansfield* (10 Ha. 254) (equitable assignment); *Hicks* v. *Powell* (4 Ch. 741) (unregistered conveyance and covenant for further assurance); *Harrison* v. *H.* (8 Ch. 342) (charge of debts and marshalling); *Norris* v. *Chambres* (29 B. 246) (purchasers' lien and notice); *Willcock* v. *Ouchterlony* (2 Bro. 36, 37, cited only) (trusts); *Martin* v. *M.* (2 Russ. & My. 507) (trusts and notice); *In re Piercy, Whitwham* v. *Piercy* ([1895] 1 Ch. 83) (trusts, conversion, and election); *Nelson* v. *Bridport* (8 B. 547) (executory trusts).

Thus far "equity follows the law."

but the non-local forum, though always *competent*, is not always *convenient*.

But equity, unlike common law, can, if it will, exercise jurisdiction over persons in regard to foreign land. The only question is, will it? Will it compel trustees to carry out English equity in regard to foreign land? Will it attain indirectly what it cannot attain directly? Will it constitute itself the *forum conveniens* for ordering trustees to act so that English equities may prevail?

The non-local forum is *convenient* where there is no local forum:

If there is no remedy in the *locus situs* the Court will act wherever it can: the *forum competens* will also be *conveniens*. This would be the case at the north pole. So, in *Derby* v. *Athol* (1 Ves. sen. 202), Lord Hardwicke held first that a plea to the jurisdiction "must show what other Court has jurisdiction," secondly that a question "to the right and title to the whole island cannot be determined in the Courts of Man"—comp. *Toller* v. *Carteret* (2 Vern. 495)—and in *Penn* v. *Baltimore* (1 W. & T. 755, Belt. 205) ordered specific performance of an agreement to delimit two whole colonies, and to convey the honors and socage thereof accordingly. It followed from *Derby* v. *Athol* that neither colony could have had jurisdiction in this inter-colonial dispute; and the conveyance could only take effect under English law. The colonies were like manors, disputes between whose lords cannot be settled in the courts of either.

secus where there is a local forum.

If there is a remedy in the *locus situs*, the rule is that it interferes in mixed actions only. This is the opposite rule to that of common law. But the rule is not quite the same in cases of (*a*) torts, (*b*) contracts, (*c*) and trusts.

(*a*) Cases on torts.

(*a*) As for cases founded on tort, the Court annulled a deed conveying Irish land in *Arglasse* v. *Muschamp* (1 Vern. 75, 135), a case which *Portarlington* v. *Soulby* (l. c.) has made obsolete: compare *Angus* v. *A.* (West 23), *Jackson* v. *Petrie* (10 Ves. 165). In the first case the Court relied on the fact that the fraud was perpetrated in England (*forum delicti*), in the other it seemed to assume that the fraud was actionable wherever committed, and emphasized only the English residence of the tort feasors. So in bankruptcy cases, the foreign bankrupt must not only reside in England, but commit his own act of bankruptcy in England: *Cooke* v. *Charles A. Vogeler Co.* ([1901] A. C. 102)†, approving *In re Pearson* ([1892] 2

Q. B. 263), and discussed in *Dulaney* v. *Merry* ([1901] 1 Q. B. 536).

(*b*) Cases of mortgage, specific performance, partnership, and other contracts

(*b*) In mortgages valid under English and the foreign law, the Court appoints receivers of, *Codrington* v. *Johnstone* (1 B. 520), redeems, *Cranstown* v. *Johnston* (3 Ves. 170), and forecloses *Paget* v. *Ede* (18 Eq. 118), a foreign land-and-chattel business, such as a "plantation:" *Scott* v. *Nesbitt* (14 Ves. 438). It allowed specific performance in regard to Irish land, *Archer* v. *Preston* (1 Eq. Ca. Abr. 133), but this case is now obsolete, *Portarlington* v. *Soulby* (3 My. & K. 104, 109): and no form in Seton is suitable to cases where land does not pass by conveyance. It allowed accounts between tenants-in-common of Irish land in *Carteret* v. *Petty* (2 Sw. 323), but this case is now obsolete: see *Portarlington* v. *Soulby:* and of a foreign chattel-and-land business in *Roberdeau* v. *Rous* (1 Atk. 543). In a partnership contract which mainly concerns personalty it orders accounts, *Hendrick* v. *Wood* (9 W. R. 588); *Maunder* v. *Lloyd* (2 J. & H. 718), and receivers, *Sheppard* v. *Oxenford* (1 K. & J. 491); and in *Cood* v. *C.* (9 Jur. N. S. 1335), which was a family arrangement of partnership claims, A. was declared trustee of the mixed property for B., and was enjoined from proceeding in the foreign Court. The Court refused specific performance, saying "the right to land in Chile must be determined by their laws," about which evidence was not taken, nor did it inquire whether its declaration would not be a *brutum fulmen* as against the land. Lord Romilly, who thought that a case must be made for equitable intervention, refused "to go a step further than those cases decide," and to declare a vendor's lien on foreign land: *Norris* v. *Chambres* (29 B. 246, 253). Lord Cottenham seemed to think that a case must be made against intervention: the Court, he said, only refuses to act "if the *lex loci* should not permit or not enable the defendant to do what the Court might otherwise decree;" "where there is no such impediment," it acts and often orders specific performance for sale or mortgage: *Ex parte Pollard* (Mont. & C. 239). If we may adopt Lord Cottenham's deductive point of view, case law establishes five practical limits to the jurisdiction of the Chancery Division over foreign land, in cases of mixed realty and personalty and of mortgages.

establish five limits to the jurisdiction.

(1) Foreign parties.

As in all transitory actions defendants must be within the forum at the date of action, *Davis* v. *Park* (8 Ch. 862), or serveable outside under R. S. C. (1883) O. XI., *Deutsche National B.* v. *Paul* ([1898] 1 Ch. 283), or R. C. C. [1899] O. LI. r. 23, *Wood* v. *Middleton* ([1897] 1 Ch. 151). They are serveable outside if English land, English residents, English property subject to English trusts, or English breaches of contracts to be performed in England, or enjoinable acts in England, or English third parties are involved. Sovereigns and ambassadors cannot be sued unless they submit to the jurisdiction, *Mighell* v. *Sultan of Johore* ([1894] 1 Q. B. 149) (cited [1900] 1 Ch. 813); *Musurus Bey* v. *Gadban* ([1894] 2 Q. B. 352); *S. A. Republic* v. *Compagnie Franco-Belge* ([1897] 2 Ch. 487; [1898] 1 Ch. 190). These are the only limits to the Court's competency; but it may refuse on the score of convenience to interfere, where foreign land is concerned in case the principal parties habitually reside abroad, and some or all of the second class of impediments occur: *Matthaei* v. *Galitzin* (18 Eq. 340) (accounts): *Doss* v. *Sec. for India* (19 Eq. 509, 535) (charge on revenue); *Reiner* v. *Lord Salisbury* (2 Ch. D. 378) (discovery); and there are many *dicta* to this effect. Where an equitable debt is proved the Court may grant a *ne exeat*: *Jackson* v. *Petrie* (10 V. 164).

(2) Foreign contracts.

(2) Having regard to *Ewing* v. *Orr Ewing* (10 A. C. 453) and to *A. G.* v. *Jewish Colonial Association*, it may be presumed that the Court will not try contracts in which the parties rely mainly on foreign law. This was the *ratio decidendi* in *Norris* v. *Chambers* (29 B. 246, 255). Kay, J., pointed out in *In re Hawthorne* (23 Ch. D. 743) that mortgagees had only been relieved when they held "English mortgages." In *Cood* v. *C.* the contract was English in place, construction, and nature; in *Maunder* v. *Lloyd* in place, but its construction depended on the *lex loci solutionis*, which was foreign, and its nature was neutral. In *Matthœi* v. *Galitzin*, *Doss* v. *Sec. for India*, and *Reiner* v. *Lord Salisbury*, the place, *locus solutionis*, and nature of the contracts were foreign.

(3) Things void by *lex loci.*

(3) The Court does not act on a document or transaction void by the *lex loci*, nor will it order any one to make the void thing valid: *Hicks* v. *Powell* (4 Ch. 741). If *Ex parte Pollard* (Mont. & Ch. 239), *Ex parte Holthausen* (9 Ch. 722), and the dicta in *Mercantile Investment Co.* v. *River Plate Trust Co.* ([1892] 2 Ch. 303), prove that where the foreign law is silent, our Courts will order any one to make void mortgages valid, these cases are inconsistent with *Hicks* v. *Powell.* But in *Ex parte Pollard* and *Ex parte Holthausen* the lands were converted in bankruptcy; and in the case of the *Mercantile Investment Co.* there were no present profits; so that these cases only prove that where land is sold the proceeds of sale will be subject to the debt, unless, as in *Waterhouse* v. *Stansfield* (9 Ha. 234, 10 Ha. 254), the *lex loci* annuls sales giving a preference to one creditor. This rule as to proceeds of sale is consonant with *In re Piercy* (*infra*), and with the rule of International Law which makes the *forum concursus* prevail. A discrepancy between English (if non-technical) and foreign law must be proved: *Bentinck* v. *Willink* (2 Ha. 1); otherwise the Courts assume that foreign law does not "impede" (in Lord Cottenham's sense) the operation of English law.

(4) Possessory cases.

(4) The Court will not order possession nor partition (which involves possession) for fear that the foreign sheriff may laugh at its *brutum fulmen*, *Carteret* v. *Petty* (2 Sw. 323, n.).

(5) Foreign *lis pendens* about land only.

(5) Overlapping is "inconvenient," see *post*, p. 390; and nowadays a *bonâ fide lis pendens* in the foreign land, about its land only, will not be enjoined, *Moor* v. *Anglo-Italian Bank* (10 Ch. D. 681); and will, if co-extensive with the English action, stay the latter: *White* v. *Hall* (12 Ves. 321); *Norton* v. *Florence Land Co.* (7 Ch. D. 332) (mortgages). An action about mixed realty and personalty will be

enjoined on such terms that decisions about the realty may be given, and shall bind our Courts: *Beckford* v. *Kemble* (1 Si. & St. 7, 16 n.); *Bushby* v. *Munday* (5 Mad. 297, 309). *Ex parte* proceedings are ignored, *Cranstoun* v. *Johnston*, but see *post*, pp. 327, 328.

(*c*) Other cases; trusts, etc., are subject to the same five limits: Thus,

(*c*) In cases arising otherwise than by contract or tort, the Court only entertains mixed actions involving personalty as well as realty. In *Bunbury* v. *B.* (1 B. 318) (will); *Bolton* v. *Curre* (70 L. T. 759) (settlement); *Clarke* v. *Ormonde* (Ja. 108, 121); *Harrison* v. *Gurney* (2 Ja. & W. 563); *Houlditch* v. *Donegal* (8 Bli. N. S. 301) (creditors' trust deeds), receivers were appointed. In the first case the mere land was unimportant, and it was assumed that if the equities did not bind the land, the land would be held subject to the *lex loci*, and compensation out of the personalty would be enforced. The owner of the foreign land will not be served outside the jurisdiction, unless it is proved that the equities bind the land: *Jenney* v. *Macintosh* (33 Ch. D. 595). In *Pike* v. *Hoare* (2 Ed. 182) and *In re Hawthorne* (23 Ch. D. 743) the Court refused to decide cases merely about foreign land. In *Tulloch* v. *Hartley* (1 Y. & C., C. C. 114), *Rainy* v. *Ellis* (26 L. T., N. S. 602), wills of personalty and realty were in question. The limits to relief in contractual cases apply here.

(2) Foreign trusts,

(2) Thus all the above settlements clearly appealed to and relied on English law. If a devise of foreign land is the sole question raised, the will clearly relies on and appeals to the *lex loci*, and England is not the *forum conveniens*: *Pike* v. *Hoare*; *In re Hawthorne*. In the last case an effort was made to declare defendant constructive trustee of the proceeds of sale of the foreign devise, in order to bring the devise within the rules of equitable jurisdiction, but in vain.

(3) Things void by the *lex loci*,

(3) Where equities do not bind the land, an express trust to sell foreign land and hold the land and its proceeds on beneficial trusts is void until the land chances to be sold, when, the trust for sale having taken effect as a power, the beneficial trusts bind the proceeds: *In re Piercy* ([1895] 1 Ch. 83) (a will of mixed realty and personalty). No Court has ever ordered a sale so as to make the void trusts valid, although this course was suggested in *Martin* v. *M.* (2 Russ. & My. 507, 529); and see *Nelson* v. *Bridport*.

(5) Foreign *lis pendens*, etc., exclude the jurisdiction.

(5) A rival administration action will be restrained subject to the device in *Beckford* v. *Kemble* (*supra*), for subjecting parties to the *lex loci* as regards the land only: *Bunbury* v. *B.*, *Hope* v. *Carnegie* (1 Ch. 320). A real action, *e.g.*, calling the receiver of the realty to account was not restrained in *Harrison* v. *Gurney*.

(1) and (4) And the first and fourth principles apply as in contracts.

Comparison of common law and equitable jurisdiction foreign land summarised.

To sum up, in mixed actions on a trust or contract affecting personalty and foreign land where there is a foreign remedy, but where the character of the document or transaction and the residence of the principal parties are English, equity interferes. Two reasons may be given; first, the cause of action being one and indivisible, if equity did not interfere, persons entitled to the personalty would be deprived of that English remedy to which they are entitled in international law; secondly, although the English judgment might be invalid against the land, yet as the action is mixed the parties can always be recouped out of the personalty. These reasons are equally applicable in a real action affecting English and foreign land, *Derby* v. *Athol*, *Arglasse* v. *Muschamp* (1 Vern. 135), *Booth* v. *Leycester* (1 Keen, 579). Otherwise certain obsolete Irish cases are the only published cases of purely real contracts, and there are no published cases of purely real trusts affecting foreign land in which equity intervened, yet there seems no reason why contracts should be subject to a different rule to trusts in this matter. Therefore the safest view is that where there is a foreign remedy, if the action is purely personal, or involves foreign realty alone, equity follows the same rule as common law; but in actions involving personalty or English land as well as foreign land, a rule of its own, which is based on convenience rather than competency, is adopted. On the other hand, if there be no law-courts or legal remedies in the foreign land, the only limits recognized are those of competency, which are the same as in transitory actions.

Generally. It is by somewhat devious methods that equity adjusts itself into the framework of international law; but the fact that the equitable theory of jurisdiction does not exactly dovetail into the accepted system of international law, is due to a characteristic to which other flaws in equitable jurisprudence may be traced. In supplementing the arrested development—the semi-civilization—of the common law, equity had to invent some of the most important rights of property—pledges of land, purchaser's rights *in rem*, the following of trust money, urban easements (restrictive covenants), married women's property, the possessory rights of the limited owner, etc.—and to pass off these solid inventions as abstract maxims, operations upon conscience, and the like. Foreign Courts have some difficulty in following the line of argument which disguises a right of property as a moral precept; and the difficulty is enhanced by the fact that no nation has produced anything which resembles equity in the English sense.

Westlake, Priv., Internat. Law (1890), sect. 116, 147, ch. viii.

Story, Equity Jurisprudence (1892), sects. 793–94, 899–902, 1290–1300.

Dicey, Conflict of Laws (1896), pp. 214–19, 516–24, 671–73, 785–99.

Lewin, Trusts, ch. iv.; White and Tudor, i. pp. 753 *et seq.*

Resulting Trust and Presumption of Advancement.

FOWKES *v.* PASCOE.

(10 Ch. 343).

Principle.

Where in the case of a purchase in the name of another there is a presumption of resulting trust, and evidence against such presumption, the Court is in the position of a jury, and will take into consideration all the circumstances of the case.

Summary of facts.

Sarah Baker was a widow who had large sums of stock standing in her own name, and other considerable property. Her only child, a son, had died, leaving a childless widow, who married again and had a son, J. I. Pascoe, and a daughter. In March, 1843, Sarah Baker invested £500, viz. £250 in the names of herself and her companion, and £250 in the names of herself and J. I. Pascoe. Subsequently, in the same year, she made her will, and gave the residue of her estate to her daughter-in-law for life, and after her death among her children. She then made further purchases in the names of herself and J. I. Pascoe, and also transferred stock into the names of herself and J. I. Pascoe, so that at the time of her death there was standing in the joint names of herself and J. I. Pascoe the sum of £7000. J. I. Pascoe deposed that the £7000 was intended as a gift to him after S. Baker's death, and his evidence was supported by that of his wife, and by circumstances which made it likely that a gift was intended, *e.g.* that J. I. Pascoe had lived with her for some years before his marriage. Held, by the C. A., that J. I. Pascoe was entitled to the £7000 stock.

Principles discussed.

Three equitable principles are involved in this case: I. The presumption of a resulting trust; II. the counter-presumption of an intention to make an advancement where the donor is a husband, father, or *in loco parentis*; III. positive evidence, including the evidence of surrounding circumstances.

I. Resulting trust.

I. The 8th section of the *Statute of Frauds* provides that trusts arising by implication or construction of law do not require to be created by writing. Hence it has long been established, as stated in *Dyer* v. *D.* (2 Cox 92), 1788, that "the trust of a legal estate, whether freehold, copyhold, or leasehold, whether taken in the names of the purchaser and others jointly, or in the names of others without that of the purchaser, whether in one name or several, whether jointly or *successive*, results to the man who advances the purchase-money." This rule "goes on a strict analogy to the rule of common law that where a feoffment is made without consideration, the use results to the feoffor." This principle has been extended to purchasers of personalty: "If a man takes a bond or purchases an annuity, stock, or other chattel interest in the name of a stranger, the equitable ownership results to the person from whom the consideration moved:" Lewin (10th ed. p. 175), to purchases by two in the name of one, *Wray* v. *Steele* (2 V. & B. 388), and *infra*, p. 15 (11), but not to a voluntary conveyance of land to a stranger: per Lord Hardwicke, *Young* v. *Peachy* (2 Atk. 257). Jessel, M.R., asserted, and James, L.J., "assumed," in the l.c., "that the implication of a resulting trust does arise as much in the case of a transfer as in that of a purchase of stock, although that is certainly not the case with regard to a conveyance of land" (pp. 345 n., 348); and see *infra* (7) (8) (13) (15) (16) (19), and Lord Romilly's view, 15 B. pp. 240, 241, 298, 299; and *post*, p. 318. For contrary *dicta* see *Cook* v. *Fountain* (3 Sw. 585); *George* v. *Howard* (7 Pr. 651).

II. Advancement

II. "The doctrine of equity as regards presumption of gifts is this, that where one person stands in such a relation to another that there is an obligation on that person to make a provision for the other, and we find either a purchase or investment in the name of the other, or in the joint names of the person and the other of an amount which would constitute a provision for the other, the presumption arises of an intention on the part of the person to discharge the obligation to the other, and therefore, in the absence of evidence to the contrary, that purchase or investment is held to be in itself evidence of a gift; in other words, the presumption of gift arises from the moral obligation to give." Per Jessel, M.R., in *Bennet* v. *B.* (10 Ch. D. 474).

By whom.

The doctrine of advancement, as was stated in this case, arises from the presumption of an intention on the part of the person to discharge his duty to another, and applies not only to the case of a parent, but also to a husband and any person who has put himself *in loco parentis*, i.e. has taken upon himself the duty of making provision for another: *Ex parte Pye* (18 Ves. 140); *Powys* v. *Mansfield* (3 My. & Cr. 359, 367); *In re Hamlet* (38 Ch. D. 183; 39 Ch. D. 426, 433; *In re Ashton* ([1897] 2 Ch. 574, 577, 578). See *post*, pp. 317, 320.

To whom.

The presumption of advancement has been held to arise where the purchase was made in the name of an illegitimate child or a grandchild, the father being dead, *Ebrand* v. *Dancer* (2 Ch. Ca. 26); *Beckford* v. *B.* (Lofft. 490), a wife's nephew who had been adopted, *Currant* v. *Jago* (1 Coll., C. C. 261), but not in the case of an illegitimate grandson whose father was alive, *Tucker* v. *Burrow* (2 H. & M. 515), nor in favour of a deceased wife's sister who was living with the purchaser as his reputed wife, but not legally married: *Soar* v. *Foster* (4 K. & J. 152)†.

Mother and child.

In *Bennet* v. *B.* (10 Ch. D. 474), Jessel, M.R., held (dissenting from *Sayre* v. *Hughes* (5 Eq. 376)), that no presumption of advancement arises in the case of a mother; and he extended this principle from the case of a married woman living apart from her husband, *In re De Visme* (2 D. J. & S. 17), to the case of a widow. But *Batstone* v. *Salter*, *infra* (16), was not cited; and the reason alleged, *i.e.* that a mother is not obliged to support her children, has lost its force since sect. 21 of the *M. W. P. A.*, 1882, which provides that "a married woman having separate property shall be subject to such liability for the maintenance of her children and grandchildren as the husband is." Jessel, M.R., went on to say: "In the case of a mother—this is the case of a widowed mother—it is easier to prove a gift than in the case of a stranger. In the case of a mother, very little evidence beyond the relationship is wanted, there being very little additional motive required to induce a mother to make a gift to her child." Compare *In re Orme* (50 L. T. 51). This suggests that although a person is not *in loco parentis* (as in the l.c.), his relationship to the donee may be a very important link in the chain of evidence which rebuts the presumption of a resulting trust.

III. Evidence.

III. The question of resulting trust or of advancement being a question of the purchaser's intention, evidence forming part of the same transaction may be admitted to rebut it; subsequent declarations, except so far as they prove intentions at the time, are inadmissible. "And it seems the subsequent acts and declarations of the father may be used against him by the son, though they cannot be used in his favour, and so the subsequent acts or declarations of the son may be used against him by the father, provided he was a party to the purchase, and his construction of the transaction may be taken as an index to the intention of the father, but not otherwise; for the question is not what did the son, but what did the father mean by the purchase:" Lewin, p. 188. "This principle of law and presumption, that a purchase in the name of a son is an advancement *primâ facie*, is not to be frittered away by mere refinement:" per Lord Eldon, *Finch* v. *F.* (15 V. 43, 50). Formerly the uncorroborated evidence of an interested party was not received by Courts of Equity so as to establish a claim against the estate of a deceased person. Jessel, M.R., had applied this rule to the l.c.: compare *In re Finch* (23 Ch. D. 267, 271); but the C. A. practically disregarded it, and consequently came to an opposite conclusion; it is now overruled;

In re Garnett (31 Ch. D. 1, 9); *In re Richardson* (30 Ch. D. 396); *In re Hodgson* (31 Ch. D. 177, 183); *In re Dillon* (44 Ch. D. 76, 80); *In re Farman* (57 L. J. Ch. 637).

Inference from evidence in leading case.

Another peculiarity about the facts of the l.c. was that the Court drew from them the inference that a gift in the nature of an advancement was intended so that there was no resulting trust; but that an advancement was not intended so as to "adeem" the gift by will (see *post*, p. 317). They regarded the matter from the standpoint of a jury; thus Mellish, L.J., said: "When there is once evidence to rebut the presumption, the Court is put in the same position as a jury would be, and then we cannot give such influence to the presumption in point of law as to disregard the circumstances of the investment, and to say that neither the circumstances nor the evidence are sufficient to rebut the presumption. The presumption must, beyond all question, be of very different weight in different cases. In some cases it would be very strong indeed. If, for instance, a man invested a sum of stock in the name of himself and his solicitor, the inference would be very strong indeed that it was intended solely for the purpose of a trust, and the Court would require very strong evidence on the part of the solicitor to prove that it was intended as a gift; and certainly his own evidence would not be sufficient. On the other hand, a man may make an investment of stock in the name of himself and some person, although not a child or wife, yet in such a position to him as to make it extremely probable that the investment was intended as a gift."

Relationship helps other evidence.

All the modern cases turn on evidence. Thus Jessel, M.R., said, in *Marshal* v. *Crutwell* (20 Eq. 328, 329), that "the mere circumstance that the name of a child or a wife is inserted on the occasion of a purchase of stock is not sufficient to rebut a resulting trust in favour of the purchaser, if the surrounding circumstances lead to the conclusion that a trust was intended. Although a purchase in the name of a wife or child, if altogether unexplained, will be deemed a gift, yet you may take surrounding circumstances into consideration, so as to say that it is a trust, not a gift. So, in the case of a stranger, you may take surrounding circumstances into consideration, so as to say that a purchase in his name is a gift, not a trust."

In the following cases a resulting trust was established:—

Cases of resulting trusts.

(1) A policy void as between the company and the insurer: *Worthington* v. *Curtis* (1 Ch. D. 419).

(2) Land; although the voluntary indenture said that value passed: *Haigh* v. *Kaye* (7 Ch. 469):

(3) Or that there was a gift in consideration of natural love, and donor and donee afterwards mortgaged the land reserving the equity of redemption to donee: *In re Duke of Marlborough* ([1894] 2 Ch. 133).

(4) A widowed mother borrowed a sum of £3000 for her son's benefit, and subsequently claimed to be a creditor in the administration of his estate. The £3000 was a loan: *Bennet* v. *B.* (10 Ch. D. 474).

(5) Tenant for life paid off charges on the inheritance. This was not an advancement to the remainderman, who was his son: *In re Harvey* ([1896] 1 Ch. 137). See (12).

(6) Money was lent out in the name of a son who was acting as solicitor for his father; the burden of proof being shifted, there was no advancement: *Garrett* v. *Wilkinson* (2 De G. & S. 244).

(7) A banking account transferred by a sick man into the joint names of himself and his wife, authorizing the latter to draw cheques: *Marshal* v. *Crutwell* (20 Eq. 328). Compare *Lloyd* v. *Pughe* (8 Ch. 88); *Thornley* v. *T.* ([1893] 2 Ch. 229).

(8) Shares transferred to a son that he may qualify for a directorship: *In re Gooch* (62 L. T. 384), or may not pay duty, *Bone* v. *Pollard* (24 B. 283). See *Childers* v. *C.* (1 D. & J. 482); *Coultwas* v. *Swan* (19 W. R. 485); *Davies* v. *Otty*, 34 L. J. (Ch.) 252).

(9) Colonial land conveyed to another in order to evade the Acts relating to free selections: *Barton* v. *Muir* (L. R. 6 P. C. 134).

Cases of advancement.

In the following cases advancement, subject or not subject to a life interest, was established:—

(10) Policy on own life in daughter's name: *In re Richardson* (47 L. T. 514).

(11) Purchase by aunt in niece's name: *Beecher* v. *Major* (13 W. R. 1054).

(12) Additions to trust capital by tenant for life who was father of remainderman: *In re Curteis' T.* (14 Eq. 217); *Ouseley* v. *Anstruther* (10 B. 453, 461). See (5).

(13) Stock transferred to a rich son: *Hepworth* v. *H.* (11 Eq. 10).

(14) A policy on a wife's life in her name was held an advancement to her separate use in *In re Winn* (57 L. T. 382).

(15) Shares transferred into the names of the donor, his wife, and two trustees of his marriage settlement were held on donor's death advancements upon trust for the wife: *In re Eykyns T.* (6 Ch. D. 115); *George* v. *Howard* (7 Price, 646).

(16) Stock transferred by a widow into the joint names of herself, her daughter, and son-in-law, was held on the death of the daughter and the widow a gift or advancement (?) to the son-in-law: *Batstone* v. *Salter* (10 Ch. 431).

(17) A father purchased cottages in his son's name; then raised the rent paid by a tenant and acted as owner, and said that the cottage was the son's after his death. There was no advancement: *Stock* v. *McAvoy* (15 Eq. 55). Contrast *Williams* v. *W.* (32 Beav. 370).

(18) A father and son entered into a bond to pay the purchase-money of a business which the son bought. Instalments of purchase-money paid by the father in his lifetime were advancements: *In re Whitehouse* (37 Ch. D. 683); but see *Skidmore* v. *Bradford* (8 Eq. 134).

(19) A widow eighty-six years of age transferred a sum of £6000 consols into the joint names of herself and her godson. She was

aware when she did this that she would be able during her lifetime to receive all the dividends, and that her godson would become entitled as survivor to the consols. She could not claim a retransfer: *Standing* v. *Bowring* (31 Ch. D. 282).

A minor point in this case was that the godson was unaware of the transfer. For the presumption that a donee accepts unless he repudiates a gift, see *Siggers* v. *Evans* (*infra*, p. 60); *London and County Banking Co.* v. *London and River Plate Bank* (21 Q. B. D. 535, cited [1900] 2 Q. B. 82, 84); *In re Arbib and Class' C.* ([1891] 1 Ch. 601). Compare *In re McCallum* ([1901] 1 Ch. 143).

(20) There is no resulting trust where a purchase is made with a view to defeat the policy of the law, *e.g.* where property was purchased by A. in the name of B., in order that B. may vote: *Philpotts* v. *P.* (10 C. B. 85); *Groves* v. *G.* (3 Y. & J. 163); *May* v. *M.* (33 B. 81); kill game, *Brackenbury* v. *B.* (2 Ja. & W. 391); or be J.P., *Crichton* v. *C.* (13 R. 770, 786). Compare *Cecil* v. *Butcher* (2 Ja. & W. 572–78). But a defendant relying on this defence should plead it: *Haigh* v. *Kaye* (see *supra*). He may not plead his own illegality (*ib.*), *Philpotts* v. *P.*

Generally.

(21) It was held by the C. A. in *Ex parte Cooper* (W. N. 1882, p. 96), that where the parties are alive and give evidence, there is no occasion to resort to presumption, as the question is one of fact.

Precatory Trusts.

In re ADAMS AND THE KENSINGTON VESTRY.

(27 Ch. D. 394.)

Principle.

The current of decisions with regard to precatory trusts is now changed. The Court will not allow a precatory trust to be raised unless, on the consideration of all the words employed, it comes to the conclusion that it was the intention to create a trust.

Summary of facts.

A testator gave all his real and personal estate and effects wheresoever and whatsoever unto and to the absolute use of his wife, her heirs, executors, administrators, and assigns, "in full confidence that she will do what was right as to the disposal thereof between my children, either in her lifetime or by will after her decease." The C. A. held, that the widow took an absolute interest in the property, "unfettered by any trust in favour of the children."

This decision of the C. A. finally settled the conflict between the older and the modern authorities on the subject of "Precatory Trusts."

Effect of the old cases.

The effect of the old cases was that when property was given absolutely to any person accompanied by words of recommendation, entreaty, request, hope, or wish (like the *peto*, *rogo*, *volo*, *mando*, *fidei tuæ committo*, by which the *fidei-commissa* were created by the Roman Law, Justinian, Instit. Lib. ii. 24. 3), such words were held to create a precatory trust in favour of other persons, if the words used were upon the whole to be construed as imperative, and if the subject of the recommendation or wish, and the object or person intended to be benefited were certain.

The rule on this subject is thus expressed in Jarman on Wills (vol. i. p. 366, 5th ed.):—"If there is a total absence of explicit direction as to the quantum to be given, or as to the objects to be selected by the donee of the property, then the Court will infer from the circumstance of the testator having used precatory words, expressive only of hope, desire, or request, instead of the formal words usual for the creation of a trust, that those words are used, not for the purpose of creating an imperative trust, but simply as suggestions on the part of the testator, for the guidance of the donee in the distribution of the property; the testator placing implicit reliance upon his discretion and leaving him the sole judge whether he will adopt those suggestions or not, and whether he will dispose of the property in the manner indicated by the testator, or in any other manner at his absolute discretion;" and by Sir A. Hobhouse in *Mussoorie B.* v. *Raynor* (7 A. C. 321): "If there is uncertainty as to the amount or nature of the property that is given over, two difficulties at once arise. There is not only difficulty in the execution of the trust, because the Court does not know upon what property to lay its hands, but the uncertainty in the subject of the gift has a reflex action upon the previous words, and throws doubt upon the intention of the testator, and seems to show that he could not possibly have intended his words of confidence, hope, or whatever they may be—his appeal to the conscience of the first taker—to be imperative words."

Former rule.

The old cases, such as *Malim* v. *Keighley* (2 Ves. 333, 529, *a*), whose principle was disapproved of in the l.c. will be found collected in Jarman (5th ed. vol. i. p. 356); Theobald on Wills (5th ed. p. 431); and Lewin on Trusts (10th ed. p. 140).

Modern rule is different.

Now the Court leans against the establishment of precatory trusts. Cotton, L.J., said in the l.c.: "I have no hesitation in saying myself, that I think some of the older authorities went a great deal too far in holding that some particular words appearing in a will were sufficient to create a trust. Undoubtedly confidence, if the rest of the context shows that a trust is intended, may make a trust, but what we have to look at is the whole of the will which we have to construe." Lindley, L.J., said: "I am very glad to say that the current has changed," and "that Lord Justice James had the courage to stem the tide," in *Lambe* v. *Eames* (6 Ch. 597)*. In that case James, L.J., said: "In hearing case after case cited, I could not help feeling that the officious kindness of the Court of Chancery in interposing trusts where in many cases the father of the family never meant to create trusts, must have been a very cruel kindness indeed. I am satisfied that the testator in this case would have been shocked to think that any person calling himself a next friend could file a bill in this Court, and, under pretence of benefiting the children, have taken the administration of the estate from the wife. I am satisfied that no such trust was intended, and that it would be a violation of the clearest and plainest wishes of the testator if we decide otherwise."

Cases of no precatory trust.

In the following cases no trust was created:—

(1) Gift of residue to testator's widow to be "at her disposal in any way she might think best for the benefit of herself and family:" *Lambe* v. *Eames* (*ubi supra*).

(2) "Absolutely with full power for her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so:" *In re Hutchinson & Tenant* (8 Ch. D. 540).

(3) "The proceeds to be applied by her in the bringing up and maintenance of all her children:" *Mackett* v. *M.* (14 Eq. 49).

(4) "It is my wish that whatever property my wife might possess at her death be equally divided between my children:" *Parnall* v. *P.* (9 Ch. D. 96).

(5) "Hoping she will leave it after her death to my son:" *Eaton* v. *Watts* (4 Eq. 151).

(6) "In the fullest trust and confidence that she will carry out my wishes in the following particulars," *i.e.* that she should by her will leave two policies, one his own, the other hers, to his daughter: *In re Williams* ([1897] 2 Ch. 12)†.

(7) Gift of heirlooms "for my life with the request that at my death they might be left as heirlooms:" *Hill* v. *H.* ([1897] 1 Q. B. 483)†.

(8) Gift of residue to nieces, "my desire being that they should distribute such residue as they think will be most agreeable to my wishes:" *Stead* v. *Mellor* (5 Ch. D. 225); comp. *Teasdale* v. *Braithwaite* (5 Ch. D. 630).

(9) "It is my desire that she allows to A. G. an annuity of 25*l.* during her life:" *In re Diggles* (39 Ch. D. 253).

(10) Gift of legacies to two nieces "for their sole and separate use

and to be independent of their husbands, and I wish them to bequeath the same equally between the *families* of" (a nephew and a niece) "*in such mode* as they shall consider right:" *In re Hamilton* ([1895] 2 Ch. 370).

(11) "They are hereby enjoined to take care of my nephew J. C. as may seem best in the future:" *In re Moore* (34 W. R. 343).

Cases of precatory trust.

On the other hand "it would be an entire mistake to suppose that the old doctrine of precatory trusts is abolished," per Lindley, L.J., in *In re Williams.* The *onus* is shifted. "Words must have their ordinary signification unless in the particular case there is something which obliges the Court to give them a meaning other than their ordinary meaning. . . . Words of request in their ordinary meaning convey a mere request, but in a particular case" circumstances may oblige the Court to construe them otherwise. No "rule of law obliges a judge in any particular case to give a meaning other than their ordinary meaning to words of request," per Lord Esher, M.R., in *Hill* v. *H.*

The following are the only modern cases of such trusts being created :—

(12) A gift of residue to wife "in full confidence that she would dispose of it amongst all their children during her lifetime and at her decease," justly: *Curnick* v. *Tucker* (17 Eq. 320), *Le Marchant* v. *Le M.* (18 Eq. 414), approved by Lindley, L.J., in *In re Williams.* But *quære;* see *Mussoorie Bank* v. *Raynor* and the l.c.).

(13) "On condition that they will support Maria:" *In re Moore.* "She maintaining my children:" *In re G.* ([1899] 1 Ch. 719). Such conditions are in all respects similar to express trusts for maintenance as in *In re Booth* ([1894] 2 Ch. 282); *Williams* v. *Papworth* ([1900] A. C. 563) (see *infra*, p. 158).

NOTE I.—*The New Principle of Construction.*

With the above quotation from Lord Esher in *Hill* v. *H.* compare "when I am told that because something occurs in one will I am to give a precisely similar effect to a similar expression occurring in another will, I object," per Lindley, L.J. (44 Ch. D. 610): and he inveighs against "the great mischief done by construing one will by paying too much attention to decisions on other will" ([1893] 3 Ch. 373). Lindley, L.J., excepted common conveyancing forms and technical expressions from these strictures on the use of precedent. Lord Halsbury, L.C., said, "I repudiate entirely the notion of laying down any canon of construction which is to extend beyond the particular instrument" construed (44 Ch. D. 605). In *In re Tredwell* ([1891] 2 Ch. 640); *In re Blantern* ([1891] W. N. 54), the C. A. also protested against darkening counsel by learning. The trend against precatory trusts is only an illustration of a new system of interpreting documents.

NOTE II.—*On Secret Trusts.*

If secret trusts are communicated to devisees and legatees they become thereby trustees notwithstanding the *Statute of Frauds* and *Wills Act* in the cases mentioned in *In re Stead* ([1900] 1 Ch. 237); *i.e.* If A., by expressly promising or tacitly consenting to carry out T.'s wishes, *Jones* v. *Badley* (3 Ch. 362), induces T. to make or abstain from revoking a will leaving property (1) to A.: A. must carry out this trust (2) to A.B. as tenants-in-common: the trust binds A. but not B. (3) to A.B. as joint tenants: A. is bound, and if the promise is antecedent to the will B. also. Further, the beneficiary will not take if he would not take if the secret were an express trust, *In re Fleetwood* (15 Ch. D. 594), *In re Huxtable* [1901] W. N. 130), and cases under the old *Mortmain Acts.* In construing these trusts the Court always meets the same two questions as in construing precatory trusts, which are (1) are they explicit as to quantum and objects? If yes, a trust is created despite minor inconsistencies, *In re Pitt Rivers* ([1901] 1 Ch. 352); (2) are they imperative? or are they calculated to set up "a second self" whom testator "desires to invest with all his own irresponsibility" in carrying out testator's wishes, as in *McCormick* v. *Grogan* (L. R. 4 H. L. 82, 95)*. In other words, the language if precatory must be sufficient to create a trust. Theobald on Wills, ed. 1900, pp. 67–9, 353.

Gift or Declaration of Trust.

RICHARDS *v.* DELBRIDGE.

(L. R. 18 Eq. 11.)

Principle.

In order to render a voluntary gift or settlement valid, there must be what amounts to either (1) *a complete transfer of the property beneficially or in trust, or* (2) *a valid declaration of trust.*

Summary of facts.

John Delbridge was possessed of a mill and of plant, machinery, and stock-in-trade belonging to it, and shortly before his death he indorsed on the lease and signed the following memorandum:—

"7th March, 1873.

"This deed and all thereto belonging I give to E. B. Richards from this time forth, with all the stock-in-trade.

"John Delbridge."

Richards was an infant at the time of the execution of the memorandum, and Delbridge delivered the lease to the infant's mother on his behalf.

Held that there was no valid declaration of trust of the property in favour of E. B. Richards.

Reason of the attempt to confuse the two.

Modern attempts to construe a gift as a declaration of trust are due to two facts; first, if a transfer is incomplete, equity will interpret it as a contract and, if for value, may grant, or if not for value must refuse specific performance: and secondly, except in cases under the Statute of Frauds (see Note) no form is required to create a trust. The formlessness of trusts was illustrated thus by Lord Selborne, L.C., in *Lyell* v. *Kennedy* (14 A. C. 437, 457):—"A man who receives the money of another on his behalf, and places it specifically to an account with a banker ear-marked and separate from his own moneys, though under his control, is, in my opinion, a trustee of the fund standing to the credit of that account. For the constitution of such a trust no express words are necessary; anything which may satisfy a Court of Equity that the money was received in a fiduciary character is enough. It is not requisite that any acknowledgment of such a trust should be made to the *cestui que trust* or his agent: to whomsoever made it is evidence against the trustee."

If it is desired to make any one else trustee for a beneficiary the same rule applies, subject to a necessity to transfer the property to the trustee.

The attempt to pass off an imperfect gift as a perfect trust failed in *Richards* v. *Delbridge* for reasons which Jessel, M.R., stated thus: "A man may transfer his property without valuable consideration in one of two ways. He may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property, takes it beneficially or on trust, as the case may be, or the legal owner of the property may by one or other of the modes recognized as amounting to a valid declaration of trust constitute himself a trustee, and without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person. It is true he need not use the words 'I declare myself a trustee,' but he must do something which is equivalent to it and use expressions which have that meaning, for however anxious the Court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning." He then cited Turner's, L.J., words in *Milroy* v. *Lord* (4 D. F. & J. 264), as summing up the whole law upon the subject: "If the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust."

There had been some conflict of authority before *Richards* v. *Delbridge* was decided (see 18 Eq., p. 13); since its decision it has been often followed.

Handing over of deeds, certificates, &c.

Thus the handing over of a mortgage deed, *In re Richardson* (30 Ch. D. 396), *In re Hancock* (57 L. J. Ch. 793), of debenture or stock certificates, *Moore* v. *Moore* (18 Eq. 474)*, a cheque, *Jones* v. *Lock* (1 Ch. 25), coupled with expressions of a desire to give, are ineffectual either as gift or trust. A direction to cancel a mortgage, *Scales* v. *Maude* (6 D. M. & G., 43), and a writing professing to assign houses and chattels, *Warriner* v. *Rogers* (16 Eq. 340), or shares or debentures, *Milroy* v. *Lord* (4 D. F. & J. 264), *In re Shield* (53 L. T. 5) coupled with the setting apart of the title deeds or certificates in a box by themselves, is also vain.

Heartley v. *Nicholson.*

An incomplete gift of shares.

In *Heartley* v. *Nicholson* (19 Eq. 233), Mr. Nicholson, on the 11th of February, 1865, wrote to his daughter, B., as follows:—"I have another present to make shortly—one share of Ryhope Colliery, and you may now consider that you have this yourself from 2nd of January to receive dividends upon. I am also giving to Sarah one, the same." On the 17th he attended a meeting of shareholders and signed the following entry in the minute book:—"That Mr. N.'s" (his own) "proposition of transferring two of his shares to the parties undernamed be agreed to, viz." (B. and her sister). On the 25th he again wrote to B.:—"I have arranged and made all right with the shares for you and Sarah, and dividends will be sent from the 2nd of January." And the dividends were so sent along with other letters of a like nature. Yet all these expressions in letters, this signature of minutes, and gift of dividend, did not avail against the authority of *Milroy* v. *Lord.* "It is," said Bacon, V.C., "unquestionable law that this Court cannot by its authority render that gift perfect which the donor has left imperfect, and it will not and cannot convert an imperfect gift into a declaration of trust merely on account of that imperfection. . . . It is not necessary that the declaration of a trust should be in terms explicit. But what I take the law to require is that the donor should have evinced by acts which admit of no other interpretation that he himself had ceased to be, and that some other person had become, the beneficial owner of the subject of the gift or transfer, and that such legal right to it (if any) as he retained was held by him in trust for the donee."

In *In re Caplen's E.* (45 L. J. Ch. 280), 1876, Mrs. Caplen had

An incomplete transfer to a trustee of a promissory note.

lent a Mr. Stening £300 on his promissory note, payable on demand. She told him that after her death she wanted him to hold the £300 for the benefit of her sister and sister's daughters, and directed him after her death to pay the interest on the £300 to her sister for her life, and afterwards to divide the principal sum among her sister's children. Mrs. Caplen received the interest during her life, and made no demand for payment of the note, and it was found by her executors among her papers, uncancelled, after her death. The question to be determined was whether a trust was created as to the £300. Jessel, M.R., in delivering judgment, said, "The evidence does not satisfy me that Mrs. Caplen intended to create an irrevocable trust. Whether she did or not, it is clear that at law she remained owner of the note, and did not therefore create a complete trust. I think, however, that a mere agreement on the part of the debtor to apply the money according to the direction of the creditor will not do. There is no magic in words, and, as I explained in *Richards* v. *Delbridge*, a man may make himself a trustee in so many words, but he must do something or other that is equivalent to declaring that he is a trustee. In *McFadden* v. *Jenkyns* (1 Ph. 153) Lord Cottenham certainly said, 'The testator in directing Jenkyns to hold the money in trust for the plaintiff, which was assented to and acted upon by Jenkyns, impressed, I think, a trust upon the money which was complete and irrevocable.' But I do not think that applicable to the present case, where there is nothing to show that the owner of the note intended to part with her legal title to the money." *In re Richards* (36 Ch. D. 541), which decided the contrary, was disapproved of in *In re Whitaker* (42 Ch. D. 119).

Copyholds.

The Court refused in *Green* v. *Paterson* (32 Ch. D. 95) to regard a covenant to surrender an estate in copyholds to trustees not perfected by surrender either as a declaration of or assignment upon trust of the equitable estate.

Application of these principles is choses in action assignable under the *J. Act*, 1873.

Applying these principles to choses in action assignable at law under the *J. Act*, 1873, a person who assigns debts to volunteers must assign them (if so assignable) under the *J. Act*, 1873, s. 25, sub-s. 6, or else his gift will be imperfect. That section enacts that an "absolute" written assignment "not purporting to be by way of charge only of any debt or other legal chose in action" shall, on notice being given to the debtor, &c., pass the legal right to such debt or chose in action from the date of such notice subject to equities. The legal right, of course, includes the right to sue in one's own name and give receipts. "The debt is no longer to be the debt of the assignor at all; the right to sue being taken from him," per Lord Esher, M.R., in *Read* v. *Brown* (22 Q. B. D. 128, 132). Assignments or attempted assignments under this section fall into two classes:—

(*a*) Assignments whether under this section or in equity of debts secured by mortgage of land (but not of the land) create only a contract to assign *In re Patrick* ([1891] 1 Ch. 82)†, citing *Woodford* v. *Charnley* (28 B. 96) and *Bizzey* v. *Flight* (24 W. R. 957); and of future earnings are invalid against a trustee in bankruptcy, *Wilmot* v. *Alton* ([1897] 1 Q. B. 17), citing *Ex parte Nichols* (22 Ch. D. 782). The chose in action must be definite, *Jones* v. *Humphreys* ([1901] W. N. 219). Contracts of a personal nature are unassignable, *Griffith* v. *Tower Publishing Co.* ([1897] 1 Ch. 21); *Tolhurst* v. *Ass. Portland, etc., Co.* ([1901] 2 K. B. 811)†.

(*b*) Assignments of a whole debt by way of mortgage, *Durham* v. *Robertson* ([1898] 1 Q. B. 765), following *Tancred* v. *Delagoa Railway* (23 Q. B. D. 239), and distinguishing *Brice* v. *Bannister* (3 Q. B. D. 569), and of a debt secured by bill of sale (but not unless by implication of the bill of sale), *In re Patrick*; of property to a trustee for self, *Wiesener* v. *Rackow* (76 L. T. 448), or creditors, *Comfort* v. *Betts* ([1891] 1 Q. B. 737); by instructions to pay my legacy to you, *Harding* v. *H.* (17 Q. B. D. 442); by endorsement and transfer of a bank deposit receipt, *In re Griffin* ([1899] 1 Ch. 408); by deed of money now or hereafter at my bank, *Walker* v. *Bradford Old B.* (12 Q. B. D. 511); or by bill of sale of present and future book debts, *Tailby* v. *Official Receiver* (13 A. C. 523)* (applying *Holroyd* v. *Marshall* (10 H. L. C. 191)*; can take effect under this section or in equity, and therefore, if voluntary, should be so worded as to take effect under this section.

The following two cases illustrate the wording which is required:—

An assignment of rights under a contract coupled with power to sue as nominees of assignor is *not* an assignment under this section, *Mercantile B. of L.* v. *Evans* ([1899] 2 Q. B. 613). Nor is an assignment by way of mortgage of part only of the debt, *Durham* v. *Robertson* ([1898] 1 Q. B. 765). Hence, if a voluntary deed adopted the language of either of these two cases, it would constitute an imperfect gift. See *post*, pp. 240, 299.

Equitable interests assignable only in equity.

The rule in cases of equitable interests is derived by analogy from the rule in the cases of legal interests; and assignor must do everything that can be done to perfect the gift; see *Sloane* v. *Cadogan* (Appendix to Sug. Vend. and Purch.), *Kekewich* v. *Manning* (1 De G. M. & G. 188), and *Donaldson* v. *D.* (1 Kay, 711). "Suppose," said Knight Bruce, L.J., in *Kekewich* v. *Manning*, "stock or money to be legally vested in A. as a trustee for B., for life, and, subject to B.'s interest, for C. absolutely: surely it must be competent to C. in B.'s lifetime, with or without the consent of A., to make an effectual gift of C.'s interest to D. by way of pure bounty, leaving the legal interest and legal title untouched. If so, can C. do this better or more effectually than by executing an assignment to D.?" Similarly, in *Nanney* v. *Morgan* (37 Ch. D. 346, 353), Cotton, L.J., said: "If the settlor transfers all the interest that he is in a position to transfer at that time, then it is effectual. If he does not, then the Court will not assist volunteers as against the settlor, and the settlement is ineffectual as regards that which he might have effectually transferred, and which he did not transfer as effectually as he could;" and an assignment of an equitable estate in stocks and shares was held valid.

But he must use words of assignment, and not merely charge his interest, as the latter operates by contract only: *In re Lucan* (45 Ch. D. 470); *Western Wagon Co.* v. *West* ([1892] 1 Ch. 271).

Nature of notice.

Notice in order to be effectual must be explicit: *Lloyd* v. *Banks* (3 Ch. 488); *Saffron Walden B. B. Soc.* v. *Rayner* (14 Ch. D. 406); *Bence* v. *Shearman* ([1898] 2 Ch. 582); and, if under the *J. Act*, in writing.

Effect of notice.

Notice does not perfect title in English as in Scotch law. "The test of completeness is whether anything remains to be done by the donee" per Byrne, J., *In re Griffin*, at p. 411. And this rule applies not only to assignments under the J. Act, ib., *Walker* v. *Bradford*, *In re Patrick*, but to equitable assignments before the Act, *Donaldson* v. *D.*, and to assignments of life policies: *Fortescue* v. *Barnett* (3 M. & K. 36); *Pearson* v. *Amicable Ass.* (27 B. 229); *In re King* (14 Ch. D. 179). Absence of notice makes assignor constructive trustee for assignee of any payment, *In re Patrick*, following *Fortescue* v. *Barnett*, *Fletcher* v. *F.* (4 Ha. 67), or cheque, *Bence* v. *Shearman* (1898, 2 Ch. 582), which he may receive in respect of the debt: as to his legal remedy *quœre*, *In re Patrick*. Notice establishes priority, *Marchant* v. *Morton* ([1901] 2 K. B. 829), and is the only protection against a trustee in bankruptcy. "Assignment, coupled with notice to the debtor, is equivalent to taking possession of the debt by the assignee, and thus takes the debt out of the reputed ownership section" of the *Bankruptcy Act*, 1883, s. 44, sub-s. 2 (3): per A. L. Smith, L.J., in *In re Goetz, Ex parte Trustee* ([1898] 1 Q. B. 787, 794). See *post*, pp. 225, 256.

Apparent exceptions.

The following are apparent exceptions to the principle of the l.c.:—

Husband and wife.

(1) Until the *M.W.P. Act*, 1882, the broad rule was that a husband could not make a gift to his wife except of paraphernalia or under some mercantile custom. Therefore *Grant* v. *G.* (34 B. 623), *Baddeley* v. *B.* (9 Ch. D. 113), and *Fox* v. *Hawks* (13 Ch. D. 822), construed as trusts imperfect gifts by husbands to wives married under the old law. But since *In re Breton's E.* (17 Ch. D. 416), these cases cannot be held binding. In this case Hall, V.C., refused to interpret a memorandum of gift of furniture written by the husband and delivered to his wife as a declaration of trust. "It was not," he said, "the purpose or meaning of the husband in writing these letters to constitute himself a trustee for his wife. I can well understand in such a case a husband saying to his wife, 'I mean to give you this as your own, but when you ask me to be a trustee for you, I must respectfully decline. I do not want to be involved in a trust of that kind or in any trust.'"

Gifts really executed,

(2) Where settlements whose language seems executory are construed as executed, as in marriage articles: *In re King* (14 Ch. D. 179); *Johnstone* v. *Mappin* (64 L. T. 48), see *post*, p. 31 *et seq.*

or in an executed settlement.

(3) "It is a mistake to apply to a" (executory) "provision in a marriage settlement, although one of a voluntary character, the same rules as the Court acts upon in considering whether a voluntary deed

is one which the settlor can set aside:" per Cotton, L.J., in *Tucker* v. *Bennett* (38 Ch. D. 1, 10); see below (5).

Gifts confirmed, or

(4) Where an imperfect deed is "confirmed" by will, and thereby becomes testamentary: *Bizzey* v. *Flight* (24 W. R. 957); see *post*, pp. 27–31.

perfected by will.

(5) Where an imperfect gift of debts is followed by the appointment of the debtor executor (whether he proves or not), *In re Griffin*, citing *In re Applebee* ([1891] 3 Ch. 422); *Strong* v. *Bird* (18 Eq. 315), or administrator, *In the goods of Agnese* ([1900] P. 60). This doctrine does not extend to other gifts to an executor: *Bottle* v. *Knocker* (46 L. J. Ch. 159).

Trusts really for equitable value.

(6) Where verbal representations by donor induce the intended donee to alter his position: *Loffus* v. *Maw* (6 L. T. N. S. 346); *Coles* v. *Pilkington* (19 Eq. 174). Again Fry, J., decided, perhaps wrongly, that the issue of a former marriage could enforce an imperfect gift in their mother's remarriage settlement. "He in effect said, Although you are volunteers, you are volunteers of an exceptional kind," per Lindley, L.J., in *A. G.* v. *Jacobs Smith* ([1895], 2 Q. B. 341, 349), citing *Gale* v. *G.* (6 Ch. D. 144). These cases turned on the fact that the deeds or promises were not voluntary in the eyes of equity. See *post*, pp. 55, 56.

Rectification and revocation.

(7) Equity may rescind or rectify a voluntary deed, but not if the trust is executed, *Paul* v. *P.* (20 Ch. D. 742), and there is no *locus penitentiæ*, *In re Sykes* (2 J. & H. 415); nor will it insert in such deeds powers of revocation, *Hall* v. *H.* (8 Ch. 430); *Henry* v. *Armstrong* (18 Ch. D. 668), or general appointment, *Bonhote* v. *Henderson* ([1895] 1 Ch. 742, 2 Ch. 202), inadvertently omitted; although it has inserted the latter power where settlor's evidence is corroborated (*ib.*), or in exceptional cases: *James* v. *Couchman* (29 Ch. D. 212); *Lackerstein* v. *L.* (30 L. J. Ch. 5). If a *bonâ fide* mistake is proved, equity can only rescind, cannot rectify a voluntary deed against settlor's wishes: *Lister* v. *Hodgson* (4 Eq. 30); *McMechan* v. *Warburton* ([1896] 1 Ir. R. 435). Except in cases of mistake, undue influence, or fraud (pp. 70–98), and subject to the peculiar doctrine of creditors' trust deeds (pp. 59–62), voluntary executed trusts, though kept secret and destroyed, *In re Wray's T.* (2 D. J. & S. 365), are inalterable. The doctrine that such deeds are revocable is Scotch, not English.

NOTE.—*Statute of Frauds.*

Statute of Frauds, ss. 7, 8, & 9.

Before the *Statute of Frauds* (29 Car. II. c. 3), trusts might be created or transferred by parol, but now the 7th section of the *Statute of Frauds* provides that all declarations of trusts of freehold, copyhold, and leasehold hereditaments must be "manifested and proved by some writing signed by the party who is by law enabled to declare such trust," or by his will. The person to declare the trust is the beneficial owner: *Kronheim* v. *Johnson* (7 Ch. D. 60), following *Tierney* v. *Wood* (19 B. 330). Under the old law both husband and wife had to concur in marriage articles relating to the wife's land: *Dye* v. *Dye* (13 Q. B. D. 147). The expression "manifested and proved by some writing," lets in subsequent acknowledgments by the trustee, as by an express declaration, a memorandum, a letter, an affidavit, or by a recital in a bond or deed, and the trust, however late the proof, operates retrospectively from the time of its creation. See Lewin, pp. 53–7; *Middleton* v. *Pollock* (4 Ch. D. 49) (estoppel); *Taylor* v. *London, etc., Banking Co.* ([1901] 2 Ch. 254) (appropriation); *James* v. *Smith* ([1891] 1 Ch. 384) (pleading).

In *Rochefoucauld* v. *Boustead* ([1897] 1 Ch. 196), Lindley, L.J., after citing *Haigh* v. *Kaye* (7 Ch. 469); *Heard* v. *Pilley* (4 Ch. 548); *In re Duke of Marlborough* ([1894] 2 Ch. 133), said that the cases on this section proved that "it is sufficient if the trust can be proved by some writing signed by the defendant and the date of the writing is immaterial. Further, that the Statute of Frauds does not prevent the proof of a fraud; and that it is a fraud on the part of the person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself." Hence plaintiff could and did prove by oral evidence that land was so conveyed to defendant as trustee for him. In *In re Duke of Marlborough*, *Douglas* v. *Culverwell* (3 Giff. 251); *Langton* v. *Horton* (5 B. 9), etc., were followed, and an apparent sale was proved to be a real mortgage. The 8th section excepts all trusts arising or resulting by implication or construction of law, or transferred or extinguished by act or operation of law. See *ante*, pp. 11–16, *In re Lulham* (33 W. R. 788); *In re Scott* ([1891] 1 Ch. 298). Sect. 9 provides that *all* grants and assignments of *any* trust or confidence shall be in writing signed by the party granting or assigning the same or by his last will.

See notes on sect. 4, *post*, pp. 343, 344.

Donatio mortis causâ.

In re **MEAD, AUSTIN** *v.* **MEAD.**

(15 Ch. D. 651.)

Principle.

A gift of a bill of exchange payable to self or order is valid as a donatio mortis causâ *though unindorsed and though it does not fall due until after the donor's death, but a gift of the donor's own cheque if not payable until after his death is not valid as a* donatio mortis causâ.

Summary of facts.

Mead had in his possession two bills of exchange payable to himself or order, and a banker's non-transferable deposit note for £2700, which required seven days' notice of withdrawal. Two days before his death, Mead, desiring to give £500 to his wife, signed the notice of withdrawal and sent it to the bank. He then signed a form of cheque which was on the back of the deposit note, "Pay self or bearer £500," and handed it to his wife. He had already handed the two bills of exchange unindorsed to a friend to cash and pay the proceeds to his wife.

Held, that there had been a valid *donatio mortis causâ* of the bills of exchange but not of the cheque.

The principle an exception to that of *Richards* v. *Delbridge.*

The principle upon which *In re Mead* was decided was thus expressed in *In re Dillon* (44 Ch. D. 76): "The delivery gives no legal title to the donee, nor did the delivery of the security in *Duffield* v. *Elwes;* but the House of Lords there laid it down that the executors were trustees for the donee, and must do what was necessary to perfect the transfer. This would not be so in the case of an incomplete voluntary gift *inter vivos*—the Court would not interfere to compel either the donor or his executors to perfect it." See *Richards* v. *Delbridge* (*ubi supra*). "The doctrine is an anomalous one, peculiar to the case of a *donatio mortis causâ:*" per Cotton, L.J. (p. 82). The gift of the bills, though unindorsed, was held to be good on the authority of *Veal* v. *V.* (27 B. 303). With regard to the cheque for £500, part of the deposit note for £2700, Fry, J., said: "The authorities stand in this way. A gift of a banker's deposit note, with the view of giving to the donee the whole sum secured by it, has been held to be a good *donatio mortis causâ.* A gift of a cheque upon a banker, the cheque not being payable during the donor's life, has been held to be not a good *donatio mortis causâ.* To which of these two classes of decisions does the present case belong? In my judgment it belongs to the latter case. The effect of the notice of withdrawal given by the testator to the bank on the 23rd of May was to set free a fund of £2700 upon the 30th of May, and upon that fund the testator drew a cheque of £500, which was not payable till that day, *i.e.* after his death. Looking at the whole of the circumstances of the case, and at the practice of the bank, which was to give a fresh deposit note for the balance when a part of the money was withdrawn, it does not appear to me that the delivery of the note was made with the intention of giving either it or the money to the wife. The intention was to deliver the cheque, and according to the authorities that is not a good *donatio mortis causâ.*"

As applied to bills and cheques in the leading case,

and in a very close

In *In re Dillon* (*ubi supra*), Dillon, the holder of a banker's deposit note for £580 in his last illness, took the note out of his chest, and said to his sister-in-law, who was attending him: "I am going to give it to you, conditionally. If I get well, you will give it me back; if not, you are all right." On the back of the note was a form of cheque which Dillon filled in by inserting the date and amount—£580. No other person was present at the transaction. The C. A. held that there was a valid *donatio mortis causâ*. *In re Mead* was distinguished on the ground that the cheque was filled in for the whole amount.

parody of the leading case,

In *Clement* v. *Cheesman* (27 Ch. D. 631), Chitty, J., cited with approval Byles on Bills (15th ed. p. 200), "that a cheque drawn by the donor upon his own banker cannot be the subject of a *donatio mortis causâ*, because the death of the drawer is a revocation of the banker's authority to pay." Compare *Bills of Exchange Act*, 1882 (45 & 46 Vict. c. 61, s. 75); *Hewitt* v. *Kaye* (6 Eq. 198); *In re Beak's E.* (13 Eq. 489); but see *In re Dillon*, at p. 83. In *Clement* v. *Cheesman* cheques to order drawn by another man, and given unindorsed by way of *donatio mortis causâ*, were classed with any other bill of exchange. Similarly a donor may give his cheque to a stranger, who gives his to donor's wife: *Bouts* v. *Ellis* (4 D. M. & G. 249).

and in the case of cheque to donor's order, unindorsed,

In *Rolls* v. *Pearce* (5 Ch. D. 730) the donor, who was then in Italy, drew two cheques on a London bank to his wife's order and gave them to her. The wife endorsed the cheques, and paid them into a foreign bank. The bank negotiated the cheques in the ordinary course of business, but they were not presented for payment at the London bank until after the donor's death. As the cheques were payable to order, and the donor knew that they could not be presented for payment either on the day they were drawn or on the subsequent day, Malins, V.C., following *Tate* v. *Hilbert* (2 Ves. 111), held that an actual dealing for value with a note would make the gift valid, and that there was a good *donatio mortis* (?) *causâ* of both cheques.

and in a questionable case.

Gifts by way of *donatio mortis causâ*, also apply to:—

Banknotes.—*Shanley* v. *Harvey* (2 Ed. 126); *Ashton* v. *Dawson* (Sel. Ch. Cas. 14); *Miller* v. *M.* (3 P. Wms. 356); *Hill* v. *Chapman* (2 Bro. C. C. 612).

(1) Banknotes.

Bonds.—*Snellgrove* v. *Baily* (3 Atk. 214); *Duffield* v. *Elwes* (1 Bligh, N.S. 497); *Gardner* v. *Parker* (3 Mad. 184).

(2) Bonds.

Deposit note given by a bank to the donor.—Cases cited in *In re Dillon*; *In re Taylor, T.* v. *T.* (56 L. J. Ch. 597); *In re Farman* (57 L. J. Ch. 637); *Dunne* v. *Boyd* (8 I. R. Eq. 609); *Cassidy* v. *Belfast Banking Co.* (22 L. R. Ir. 68); *Porter* v. *Walsh* ([1896] 1 Ir. R. 148) (unendorsed).

(3) Deposit note.

Keys as affording the means of obtaining possession of the thing given.—*Ward* v. *Turner* (2 Ves. Sen. 431, 443)*; *Jones* v. *Selby* (Prec. Ch. 300); *Smith* v. *S.* (2 Str. 955); *In re Mustapha* ([1891] W. N. p. 201).

Keys.

Mortgage deeds.—*Richards* v. *Syms* (Barnard. Ch. Cas. 90); *Hurst* v. *Beach* (5 Madd. 351); *Duffield* v. *Elwes* (1 Bligh, N.S. 497)*; *Merideth* v. *Watson* (17 Jur. 1063).

Mortgage.

Policy of insurance.

Policy of insurance.—*Witt* v. *Amis* (1 Best & Sm. 109); *Amis* v. *Witt* (33 Beav. 619).

Receipt for money.

Receipt for money.—*Moore* v. *Darton* (4 De G. & Sm. 517); but not a pass book, *McConnell* v. *Murray* (Ir. 3 Eq. 460) *In re Beak's E.* (13 Eq. 489); nor an I. O. U.—*Duckworth* v. *Lee* ([1899] 1 Ir. R. 405).

Stock certificates.

As to stock certificates *quœre.—Lambert* v. *Overton* (11 L. T. 503); *Moore* v. *M.* (18 Eq. 474, 483).

An imperfect will is not a D.M.C.

In *In re W. Hughes* (36 W. R. 821), a testator who had by his will given his wife the income of his property, signed, when in anticipation of death, the following document:—"March 1st, 1887. I give all my insurance money that is coming to me to my wife Hannah for her own use, as well as £200 in the bank. This is my wish." This document was attested by only one witness, and was at testator's request placed with his will, and remained there until his death in the following month. Evidence was admitted as to the circumstances attending the execution of the document. The C. A. decided that the document was intended as a testamentary instrument, and could not take effect as a *donatio mortis causâ.* And there was a further reason, "the subject of this alleged gift was not property the title to which or the evidence of title to which passes by delivery, to which property alone, speaking generally, the doctrine of *donatio mortis causâ* applies."

So in *In re Dash* ([1900] 2 Ch. 812) a lady said she dictated a *document*, giving *all* her property to L., *subject* to his paying her debts, etc., and handed him a deposit note and share certificate. It was held, chiefly owing to the italicized words, that the whole transaction amounted to an invalid will.

Origin in Roman law.

The English law concerning *donatio mortis causâ* is based upon the Civil Law. The following is the definition given by Justinian, Inst. lib. 2, tit. 7, 1: "*Mortis causâ donatio est, quœ propter mortis fit suspicionem; cum quis ita donat ut, si quid humanitûs ei contigisset, haberet is qui accepit; sin autem supervixisset is qui donavit, reciperet, vel si eum donationis pœnituisset, aut prior decesserit is cui donatum sit. Hœ mortis causâ donationes ad exemplum legatorum redactœ sunt per omnia.*

Essentials of a *donatio mortis causâ.*

There are three essentials of a *donatio mortis causâ:*—

1. Donor must be ill and expect to die, and the gift must be with a view to his death. He must not be a healthy man contemplating suicide: *Agnew* v. *Belfast and Co.* ([1896] 2 Ir. Rep. 204).

2. The giver must part with dominion and possession instanter: *In re Dash.* The gift may be subject to payment of funeral expenses, *ib.*, and must be subject to an implied or express condition of revocation in case donor does not die of his existing disorder.

3. There must be delivery of the subject-matter by the donor himself to the donee or some one on behalf of the donee.

Compared with a legacy and

A *donatio mortis causâ* resembles a legacy, and differs from a gift *inter vivos* in the following respects:—(1) It is ambulatory, but is not revoked by a subsequent will, though it may be satisfied by a legacy.

(2) It might have been made to the wife of the donor before the *M. W. P. Act.* (3) There must be delivery; but delivery may be antecedent: *Cain* v. *Moon* ([1896] 2 Q. B. 283). (4) It is subject to estate duty under the *Finance Act*, 1894, s. 2 (1) (c), and was subject to account duty under the *Customs and Inland Revenue Act*, 1881, s. 38 (2); a *donatio inter vivos* more than twelve months before the donor's death escapes duty. (5) It is liable for debts on deficiency of assets.

donatio inter vivos.

A *donatio mortis causâ*, on the other hand, differs from a legacy in the following respects:—(1) It does not require probate, as it takes effect at once *sub modo* (*i.e.* conditionally). (2) It requires no assent from the executor or administrator to perfect the donee's title. See Williams on Executors, 9th ed. 681 *et seq.*; Roper on Legacies, ch. i.

Executory Trusts.

SACKVILLE-WEST *v.* VISCOUNT HOLMESDALE.

(L. R. 4 H. L. 543.)

Principle.

In construing executory trusts the Court exercises a large authority subordinating the language to the intent.

Summary of facts.

The Countess Amherst by a codicil to her will gave certain freeholds, leaseholds, copyholds, and chattels to trustees in trust to settle them in a course of settlement to correspond as nearly as might be practicable with the limitations of the barony of Buckhurst, in such manner and form as the trustees should think proper, or as their counsel should advise. The limitations of the letters patent of the barony of Buckhurst after the decease of the Countess de la Warr were to R. W. Sackville-West, and "the heirs male of his body," and in default of such issue to the third, fourth, and fifth sons of the Countess de la Warr successively, and the heirs male of their bodies, with a shifting clause by which in certain events the barony was to go over. The House of Lords decided that the estates ought to be limited in a course of strict settlement to the second and other younger sons of the Countess de la Warr for their respective lives without impeachment of waste, with remainder to their sons successively in tail male in the order mentioned in the letters patent creating the barony, and that the copyholds, leaseholds, and chattels were to go in a similar manner so far as the rules of law and equity would allow, and that the settlement ought to contain powers of jointuring and of charging portions.

Principle of the leading case.

In this case, as Lord Cairns said, in delivering judgment (p. 577), the law on the subject was so completely settled that no principle or rule was in controversy, the only question was "as to the proper construction of an imperfect and inartistic codicil." The codicil to Lady Amherst's will, said another of the Law Lords, creates an "executory trust." The object of the testatrix was to annex as far as she could "alienable" hereditaments and other property to an "inalienable" Barony, to attach the property by an apt and formal method of law to the new Peerage, so as to make it a provision for the Peerage. The settlement, it is to be observed, was to be made to correspond, so far as might be practicable, with the limitations of the Barony. "To correspond," said Lord Cairns, "does not mean to be identical with, but to harmonize with, or to be suitable to, and the words 'so far as they may be practicable'" implied "'a recognition of the difference which must always exist in substance between the limitation of a dignity and the limitation of property of any and every tenure." Lord Westbury, after stating the general principle which is given as the head note, proceeded as follows:—"It is plain, from the whole of the codicil, that the general and leading intent of the testatrix was to make provision for the support and maintenance of the dignity; and it would be mere mockery of this intent and purpose if the estates were settled so that they would at once become the absolute property of Reginald to the disherison of all subsequent possessors of the dignity under the letters patent." The question therefore to be determined was whether, to use the words of Lord St. Leonards in *Egerton* v. *Earl Brownlow* (4 H. L. C. 210), "the testatrix has been her own conveyancer, whether she has left it to the Court to make out from general expressions what her intention is, or has so defined that intention that you have nothing to do but to take the limitations she has given you, and to convert them into legal estates."

Two kinds of trust.

Trusts (according to the old distinction established, as Lord Hardwicke said in *Bagshaw* v. *Spencer* (2 Atkins, 582), by the case of *Lord Glenorchy* v. *Bosville* (W. & T.'s L. C. ii. 763), 1733, are either "executed" or "executory."

Executed trust.

A trust is said to be executed where the limitations of the equitable interest are complete and final. Executed equitable trusts are construed as strictly as legal limitations: *In re Whiston's S.* ([1894] 1 Ch. 661). Opposed to the executed trust is the "executory" trust, which is "not a trust which remains to be executed, for in this sense all trusts are executory at their creation, but a trust which is to be executed by the preparation of a complete and formal settlement, carrying into effect, through the operation of an apt and detailed legal phraseology the general intention compendiously indicated by the testator:" per Lord Cairns, in the l.c. (p. 571). In an executory trust the objects take not immediately under it, but by means of some further act to be done by a third person, usually him in whom the legal estate is vested. An executory trust is to an executed trust as the "projet de loi" is to statute-law. Consequently technical rules for construing words of limitation are inapplicable to the executory instrument. Thus in marriage articles where a legal (equitable) estate is limited to B. for life mediately or immediately followed by a legal (equitable) remainder to his heirs, or the heirs of his body, this limitation, if literally introduced into the settlement, would confer an estate of inheritance on the husband, and so enable him to defeat the very object of the settlement. This rule of law has been expounded in three leading cases, *Shelley's Case* (1 Rep. 93)*, *Jesson* v. *Wright* (2 Bl. 1)*, and *Van Grutten* v. *Foxwell** ([1897] A. C. 658), and has been applied in *In re Youman's Will* ([1901] 1 Ch. 720) and distinguished in *Evans* v. *E.* ([1892] 2 Ch. 73); and discussed in *Pelham Clinton* v. *Newcastle* (*Duke*) (69 L. J. Ch. 875) ([1901] W. N. 207). But, therefore, said Lord Westbury, in the l.c. p. 565, a Court of Equity discerns an intention that the issue in such cases shall take as purchasers, refuses to give to the words "heirs of the body" their proper effect and meaning at common law, and directs a settlement on the first and other sons in tail. Although the words of limitation are neither informal nor imperfect, their legal effect is overruled by the intention. Marriage articles are the rough jottings or heads of the provisions intended to be formally embodied in a regular settlement, and therefore the Court assumes from the nature of the instrument an intention to settle the property by a subsequent deed. No such presumption exists with regard to wills or deeds, which are not marriage articles; here the intention that the beneficiaries are to take, not under this, but under a subsequent deed, must appear on the face of the instrument: and the first and most important question which has to be asked is, are these dispositions executory? After which a second question occurs: did testator give precise instructions as to the trusts to be declared, or only "rough jottings or heads"?

Executory trust.

The following are cases in wills where an executory trust was

Executory

cases loosely construed (1) where life estate was created,

created, and the executed trust departed from the letter of the executory trust, so that (1) the first beneficiary took a life interest :—

(*a*) A devise to trustees of money to buy land which is *to be settled* on B. for life *without* "*impeachment of waste* . . . remainder to the heirs of the body of B.:" *Papillon* v. *Voice* (2 P. Wms. 470). Compare *Sweetapple* v. *Bindon* (2 Vern. 536); *Lord Glenorchy* v. *Bosville* (W. & T. L. C. ii. 763).

(*b*) "And afterwards *to settle* the remainder" on two sons and the heirs of their body, "taking special care in such settlement that it should never be in the power of either son to dock the entail of the estate given to him *during his life:*" *Leonard* v. *Sussex* (2 Vern. 526).

(*c*) "*To be settled as counsel should advise* upon trust, and to and for the use of B. and his issue in tail male, to take in succession and priority of birth:" *White* v. *Carter* (2 Ed. 366).

(*d*) "Upon trust *as counsel should advise to* convey, *settle*, and assure the said premises to or for the use of or in trust for" B. for life, "then on the heirs of her body:" *Bastard* v. *Proby* (2 Cox, 6).

(*e*) Upon trust "to convey, assign, and assure to the use of my son J. F. and the heirs of his body lawfully issuing, but *in such manner and form* and subject to such limitations and restrictions as that if J. F. shall happen to die without leaving lawful issue, then that the property may after his death descend unincumbered:" *Thompson* v. *Fisher* (10 Eq. 207). Compare *Shelton* v. *Watson* (16 Sim. 543); *Trevor* v. *T.* (1 H. L. C. 239) ("issue").

(*f*) Upon trust "to settle it on himself and his issue male:" *Parker* v. *Bolton* (5 L. J. N. S. Ch. 98). Contrast (*l*).

(*g*) A bequest of jewels "to my nephew, to go and be held as heirlooms by him and by his eldest son on his decease, etc., as far as the rules of law or equity will permit. And I request my said nephew to do all in his power by his will or otherwise to give effect to this my wish:" *Shelley* v. *S.* (6 Eq. 540).

(*h*) Of chattels to trustees upon trust, to select some "for the said Earl of Essex and his successors, to be held and settled as heirlooms and to go with the title:" *In re Johnston* (26 C. D. 538).

(and tenancy-in-common),

(*i*) "With respect to the share of my daughter," the property to be secured for her and her children's benefit. She takes for life, *Combe* v. *Hughes* (14 Eq. 415); and her children as tenants-in-common, not joint tenants: *Mayn* v. *M.* (5 Eq. 150); contrast *Bustard* v. *Saunders* (7 B. 92); *Newill* v. *N.* (7 Ch. 253).

(and *cy-près*).

(*j*) Of leasehold estates to trustees "upon and for such trusts, interests, and purposes, and with, under, and subject to such powers, provisoes, and directions as, regard being had to the difference in tenure of the premises respectively, would best and most nearly correspond" with those regarding his Cardiganshire freehold estates. The Cardiganshire freehold estates were limited, without the intervention of trustees, to the use of testator's fourth son for life, remainder to the fourth son's eldest son in tail. There was a clause shifting the Cardiganshire freehold estates from the fourth to the fifth son's family in case the fourth son's family became entitled to the third son's estates. This clause would have infringed the rule against perpetuities if applied literally to leaseholds; but the trust was held to be "executive" only: "best and most nearly" was construed as meaning "having regard to the assistance which conveyancers can offer;" and conveyancers could "so mould the trusts that, having regard to the nature of the tenure, they will not fail:" *Miles* v. *Harford* (12 C. D. 691).

(2) Or *cy-près* was applied.

(2) Where *cy-près* was applied.

(*k*) A bequest of residue to daughters, their shares to be settled upon the same trusts as legacies to them. But the legacies contained a proviso that they might sink into the residue. This proviso is modified in the settlement in order to prevent a partial intestacy: *In re Ballance* (42 Ch. D. 62).

(*l*) A devise that after C.'s decease land should be settled by counsel and go amongst testator's grandchildren and their issue in tail male in the shares in which C. appoints: *Marshall* v. *Bousfield* (2 Mad. 166). Here the grandchildren did not take for life. If they had, the perpetuity limit would be transgressed.

(3) Executory cases strictly construed.

(3) In the following cases an executory trust was interpreted as strictly as an executed trust.

(*m*) A devise upon trust to buy land which testator directed to be settled, as other devised estates were settled, *i.e.* on B. and his heirs male: *Seale* v. *S.* (Pre. Ch. 421); *Austen* v. *Taylor* (1 Ed. 361).

(*n*) Bequest to daughters "to be settled on themselves at their marriage." The daughters claim the whole fund: *Magrath* v. *Morehead* (12 Eq. 491); *Munt* v. *Glynes* (41 L. J. Ch. 639); *Laing* v. *L.* (10 Si. 315). The executory trust was invalid.

(*o*) A devise to trustees to pay debts and convey to use of B. for life, remainder to his heirs male; B. to have powers of leasing: *Bale* v. *Coleman* (2 Eq. Abr. 309, n.).

(*p*) A devise of land "when purchased to B. and the heirs male of his body:" *Harrison* v. *Naylor* (2 Cox, 247).

(*q*) A devise of land to a son, "a proper entail to be made to the male heir by him:" *Blackburn* v. *Stables* (2 V. & B. 367); compare *Jervoise* v. *Duke of Northumberland* (1 J. & W. 559).

(*r*) A devise of money to buy land, and "to settle and assure" the same "to the use of every son" of J. S., "and the assigns of such son during "his life" makes J. S.'s sons tenants-in-common: *Surtees* v. *S.* (12 Eq. 400). It was contended that J. S.'s sons should take successive life estates.

(4) Cases of executed trusts.

(4) In the following cases an executory trust was not created, and the first beneficiary took an absolute interest.

(*s*) A bequest of chattels "upon trust, to permit the same to go and be held and enjoyed with the title, so far as the rules of law and equity will admit, by the person who for the time being shall be actually possessed of the title in the nature of heirlooms:" *In re Exmouth* (23 C. D. 158, 163).

(*t*) "To the sixth Earl of Essex and to his successors." "To the sixth Earl of Essex and his successors, and to be enjoyed with and to go with the title:" *In re Johnston* (26 C. D. 538).

(5) Executed trust construed loosely.

(5) In the following case an executed was construed as loosely as an executory trust:—

(*v*) Testator bequeathed diamonds to Lord Inchiquin "as head of the family, and so far as I lawfully can, I direct that the said diamonds shall be deemed heirlooms in the family, and shall be held by the person for the time being bearing the title of Baron Inchiquin." It was held that the legatee was trustee for himself and his successors. But the question as between the first and subsequent *c.q.t.* was undecided: *Montagu* v. *Lord Inchiquin* (23 W. R. 592).

"Proper clauses."

(6) As to clauses relative to jointuring and portioning, etc., appropriate to a settlement made in pursuance of an executory trust, see *In re Gowan* (17 Ch. D. 778); *In re Parrott* (33 Ch. D. 274); and Davidson's Precedents, 3rd ed. vol. iii. pt. i. pp. 195, 329, 602, 662 *et seq.* For special classes see *Grier* v. *G.* (L. R. 5 H. L. 688, 706) (portioning); *Viscount Holmesdale* v. *West* (12 Eq. 280) (portioning clause in l.c.); *Cope* v. *De la Warr* (8 Ch. 982) (shifting clause in l.c.); *Wise* v. *Piper* (13 Ch. D. 848) (power of sale and exchange); *Loch* v. *Bagley* (4 Eq. 122) (no trust for children: see (*n*)); *Nash* v. *Allen* (42 Ch. D. 54) (second marriage); *Stanley* v. *Jackson* (23 B. 450) (power to appoint); ib., and *Clive* v. *C.* (7 Ch. 433) (anticipation); ib., and *Stanley* v. *Coulthurst* (10 Eq. 259)† (waste); *In re Maddy's E.* ([1901] 2 Ch. 820) (after-acquired property).

In the l.c. the Court interpreted testator's revoked will as indicating testatrix's idea of what clauses a settlement should contain.

Rectification.

The insertion of inappropriate clauses in a post-nuptial settlement gives rise to an action to rectify the settlement. See *Cogan* v. *Duffield* (2 Ch. D. 44); *Hanley* v. *Pearson* (13 Ch. D. 545); *Tucker* v. *Bennett* (38 Ch. D. 1). Rectification of voluntary settlement is discussed, p. 26.

Investment Trusts.

SMITH *v.* ANDERSON.

(15 Ch. D. 247.)

An association consisting of more than twenty persons formed for the purpose of contributing funds to be invested and held by trustees for the benefit of the association does not require registration under section 4 *of the Companies Act*, 1862. Principle.

The Submarine Cables Trust was constituted by a deed between six trustees and a covenantee "on behalf of all the holders for the time being of the certificates thereinafter mentioned." The public had been invited by prospectus to subscribe, and had subscribed for the purchase by and in the names of six paid irremovable trustees of stock, etc., issued by eight or ten different submarine telegraph companies. The trustees issued to each subscriber of £90 a certificate for £100 and a "coupon of reversion;" and the total value of the certificates corresponded with that of the stock, etc. The trustees were to apply the annual proceeds of the stock, etc., after payment of expenses, in payment of interest up to 6 per cent. on the certificates, and apply the surplus in redeeming the certificates, as mentioned in the trust deed. The proceeds of stock, if sold, were to be applied in the same way as the surplus income, unless the certificate holders by special meeting authorized reinvestment. The trustees were to call an annual general meeting of certificate holders, which should be conducted after the manner prescribed by Table "A" of the *Companies Act*, 1862, and should receive reports, appoint Summary of facts.

auditors, new trustees on the death, incapacity, or retirement of old trustees, and sanction extraordinary expenses. As soon as all the certificates were redeemed the securities were to be realized and the net proceeds divided proportionally among the holders for the time being of the coupons of reversion. The certificate holders were more than twenty in number, and an action was brought by one of them on behalf of all the rest, alleging that the association was illegal and claiming to have the funds distributed proportionally among the certificate holders. The C. A. (reversing Jessel, M.R.) dismissed the action.

Companies Act, 1862, s. 4.

The 4th section of the *Companies Act*, 1862, on which the question turned, provides that "no company, association, or partnership consisting of more than twenty persons, shall be formed after the commencement of this Act (2nd November, 1862), for the purpose of carrying on any business" (except banking) "that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under this Act," or has some other basis in statute law or privilege. Just as there is a minimum of seven for a company—in *Salomon* v. *S.* (1897, A. C. 22), the one-man company case, they were very shadowy, but still they were seven—so there is a maximum of twenty for a partnership formed for gain.

This section gives rise to two questions:—

Partnership in wider sense.

(1) First, what is a partnership, association, or company? There is no English word which includes partnerships and companies; but the word "partnership" is often used to do duty for the absence of such a word. The word "association" has no meaning of its own in this section. James, L.J., distinguished a partnership (in its narrower sense) and a company thus: "An ordinary partnership is a partnership composed of definite individuals bound together by contract between themselves to continue combined for some joint object, either during pleasure or during a limited time, and is essentially composed of the persons originally entering into the contract with one another. A company or association is the result of an arrangement by which parties intend to form a partnership which is constantly changing, a partnership to-day consisting of certain members, and to-morrow consisting of some only of those members along with others who have come in, so that there will be a constant shifting of the partnership, a determination of the old and a creation of a new partnership, and with the intention that, so far as the partners can by agreement between

Association.

Distinction between company and partnership in narrower sense.

themselves bring about such a result, the new partnership shall succeed to the assets and liabilities of the old partnership." Compare *Baird's Case* (5 Ch. 725).

A business for gain.

(2) What is a business for purpose of gain? This question is analogous to the question asked under the old Bankruptcy Acts: What is a trader? But a "business for gain" is wider than the word trade or mere buying and selling. Compare 15 Ch. D. 258, 259.

Two questions in leading case.

(1) No partnership.

The investment trust described in the leading case was a most perfect parody of the form of a joint stock company, even more perfect than those literary institutions which have lately been looked on as "in the nature of joint stock companies," *In re Russell Inst.; In re Jones* ([1898] 2 Ch. 72, 83); but the C. A. paid no attention to questions of mere form. The question which they had to decide depended on the answers to the two crucial questions which sect. 4 suggests: (1) Was this association a partnership in the wider sense? Mutual agency is the very essence of a partnership: *Cox* v. *Hickman* (8 H. L. C. 268)*, recently applied in *Ex p. Baxter* ([1892] 2 Q. B. 478); *Ex p. Schofield* ([1897] 2 Q. B. 495); *Ex p. Jones* ([1896] 2 Q. B. 484); but the members of this association "could not have been made liable for any contract made by the trustees" (p. 280), much less for any contract made by any other member. It was "inconsistent with the nature of the whole transaction that they, 'the members,' should be parties (directly or indirectly, either by themselves or through any agent for them) to any contract, or be liable for any act of misfeasance or neglect of any manager, agent, or servant" (p. 275). True, there was common gain; but so there is in the case of Bolivian bondholders, *Wilson* v. *Church* (13 Ch. D. 1), and creditors under a trust deed: *Cox* v. *Hickman* (*ubi supra*): *Smith* v. *Cooke* ([1891] A. C. 297); but "persons who have no mutual rights and obligations do not constitute an association" (James, L.J., meant a partnership), "because they happen to have a common interest or several interests in something which is to be divided between them" (p. 275). Again, there were common representatives of the concern, but they were trustees, not agents; "so far as there is any business it is the business of the trustees, not as agents with principals behind, but their own business," subject only to a liability to account to their *c.q.t.* (p. 285). Compare *Owen* v. *Cronk* ([1895] 1 Q. B. 265, 275). In the main, they were like the trustees in *Crowther* v. *Thorley* (32 W. R. 330), of whom Brett, L.J., said, "There is no such thing as an agent who is not bound to obey the orders of his principal. These trustees were decidedly not bound to obey the orders of a principal" (p. 333). The distinction between trustee and agent lies at the very root of the idea of a trustee. He is always principal and never agent (see pp. 187 *et seq.*). As soon as his agent masquerades as principal he assumes the mantle of trustee. As soon as one trustee acts as though he were his colleagues' tool, he only accentuates his own responsibility (pp. 175 (12), 193 (23)). Compare *In re Kingston C. M. Co.* ([1896] 1 Ch. 345, *et seq.*). This distinction is in many cases clear as daylight, although judges have missed it even then, as in *In re Weal* (42 Ch. D. 674, 677, 678). In the l.c. the distinction between a discretionary agent authorized to trade in his own name and the trustee for *c.q.t.*, who are *sui juris*, seemed dim and subtle, but the Court relied on it as their first *ratio decidendi.*

(2) No business.

(2) The second *ratio decidendi* was more coarse and palpable; there was no continuous business to be carried on by the trustees. True, both trustees and *c.q.t.* directed reinvestments in certain cases, yet that was "a merely subsidiary part of the transaction; and if the substantial part of what they have to do is not a business, a mere subsidiary provision will not bring them within the Act" (p. 279). Compare *Reg.* v. *Whitmarsh* (15 Q. B. 600). Again, Jessel, M.R., had held that there was mutual insurance against the risks of any one of these eight or ten enterprises. Perhaps so, but here there was merely a trust to invest once for all, the investment being spread over a number of different securities, so as to enable persons who chose to invest their money in this way to avail themselves, in the words of James, L.J., of "the doctrine of averages;" that is to say, that if a large number of different independent securities of a hazardous description were held together, the loss upon some would be compensated by the gain on the others, so that a tolerably uniform average rate of interest would be obtained; but business meant a succession of acts, not the attributes of a single act: but see *In re Padstow, etc., Ass.* (20 Ch. D. 137, 148). Bowen, L.J., said in *Crowther* v. *Thorley* (*ubi supra*), "There is no more a business of land-jobbing because persons club together to buy a piece of land, than there is of tea-dealing if they club together to buy a chest of tea" (p. 333). So here they had clubbed together to buy an investment more cheaply and safely. As the Commercial Codes of the Continent would put it, an association is only commercial if it habitually engage in commercial acts.

Cases of freehold land company.

Persons (more than twenty) associate together and appoint trustees (less than twenty) to buy a certain property, and (*a*) to allot it to members, reserving the mines: this is no "business." (*b*) To work the mines, holding profits as trustees for the members. The trustees are not "agents" of the members; therefore there is no "partnership:" *Crowther* v. *Thorley* (32 W. R. 330). (*c*) To lay out roads, drain, and execute other works: this is no "business:" *In re Siddall* (29 Ch. D. 1); *Wigfield* v. *Potter* (45 L. T. 612). In each of these cases there was a committee of management who with the trustees were less than twenty.

Loan funds.

(*d*) Persons (more than twenty) appoint a removeable trustee to receive their subscriptions, and with the sum so formed, lend money at interest to members: *Jennings* v. *Hammond* (9 Q. B. D. 225).

(*e*) A in (*d*), only the trustee is called president, and there is a committee of management, ten in number: *Shaw* v. *Benson* (11 Q. B. D. 563).

(*f*) As in (*d*), but *semble*, the trustee is not removeable, and there is a committee of management, seven in number, with power to make bye-laws: *Ex p. Poppleton* (14 Q. B. D. 379).

In all these cases, (*d*), (*e*), (*f*), there is a "business" carried on for "gain," and the trustees and committee are merely agents of the members, who are therefore partners.

Mutual assurance.

(*g*) Shipowners (more than twenty) appoint a manager and committee of less than twenty, who receive their subscriptions and pay out of them compensation for any loss at sea incurred by members. If insufficient, the members pay the balance. This association carries on a "business" for "gain," its manager and committee are agents, and its members "partners:" *In re Padstow Total Loss, etc., Assurance Ass.* (20 Ch. D. 137).

(*h*) *M'Keown* v. *Joint Stock Institute* (T. L. R., 25th May, 1896) followed *Smith* v. *Anderson*, distinguishing *In re Padstow Association.*

Effect of non-registration.

If a society requires to be registered and is not registered, it cannot nor can any one representing it bring an action; and it cannot even be wound up, *In re Padstow Association* (*ubi supra*), unless perhaps at the instance of a *bonâ fide* creditor, who had no reason to suspect its illegality: *Ex p. Hargrove* (10 Ch. 542); *In re South Wales Atlantic Steamship Co.* (2 Ch. D. 763); *In re Bowling and Welby's Contract* ([1895] 1 Ch. 663); *In re Ilfracombe P.M.B.B. Soc.* ([1901] 1 Ch. 102). Its incapacity cuts both ways, as its members have no redress when unjustly expelled: *Chamberlain's Wharf* v. *Smith* ([1900] 2 Ch. 605) following *Rigby* v. *Connol* (14 Ch. D. 482), and distinguishing *Swaine* v. *Wilson* (24 Q. B. D. 252); see *post*, p. 164.

Lindley on Company Law, 5th ed. pp. 621, 622.

Charity—The Cy-près Doctrine.

In re CAMPDEN CHARITIES.

(18 Ch. D. 310.)

Principle.

The cy-près doctrine is applied to charitable gifts when from lapse of time and change of circumstances it is no longer beneficial to carry out the intention of the donor in the exact mode which he has directed.

The Court will not interfere with a scheme settled by the Charity Commissioners unless the Commissioners have exceeded their jurisdiction or the scheme contains something wrong in principle or wrong in law.

Summary of facts.

The charitable gifts in question consisted of (1) £200 left by the will of Viscount Campden in the year 1629 for the poor of Kensington, "as the trustees for the time being should think fit to establish for ever." (2) £200 left in 1643 by the will of Viscountess Campden to purchase lands of the clear annual value of £10, £5 of which should be "paid half yearly in the church or porch thereof" to such of the poorest people in Kensington as were "of good life for their better relief," and the other £5 to be applied yearly "to put forth one boy or more being of the said parish to be apprenticed." Both these sums of £200 were laid out in the purchase of land. The parish of Kensington had increased enormously, and the total rents of the charity estates were about £3600, of which £2200 belonged to Lady Campden's Charity. Apprenticeship had almost died out, and opinion had changed as to the expediency of doles.

Accordingly the trustees had for a considerable time been applying the charity funds in a manner which, though beneficial, was not in accordance with the directions in Lady Campden's will. The Charity Commissioners prepared a draft scheme for the administration of the charities, by which they appropriated the income to interim relief, hospitals, the promotion of thrift, old age pensions, education, advancement (including apprenticeship), and the like. Some of the parishioners objected to the scheme, and produced evidence that there was no lack of deserving objects of the charity ready to take under the old mode of applying the income, but the C. A., reversing the decision of Hall, V.C., refused to interfere with the discretion of the Commissioners, and confirmed the scheme.

Principle. The principle upon which the Court proceeds in applying the doctrine of *cy-près, i.e.* following as nearly as possible the intention of the donor, was thus laid down by Lord Eldon in *Moggridge* v. *Thackwell* (7 Ves. 36)* and *Mills* v. *Farmer* (1 Mer. 55)*: "Although the mode in which a legacy is to take effect is in many cases, with regard to an individual legatee, considered as of the substance of the legacy, where a legacy is given so as to denote that a charity is the legatee, the Court does not hold that the mode is of the substance of the legacy, but will effectuate the gift to charity as the substance; pro-providing a mode for that legatee to take which is not provided for any other legatee." This principle is subject to the qualification that the Court cannot alter provisions sanctioned under Acts of Parliament and Royal Charters: *A.-G.* v. *Governor of Christ's Hospital* ([1896] 1 Ch. 879).

External changes, Hall, V.C., had based his decision upon the grounds that the scheme did not separate Lord Campden's from Lady Campden's bequest; and that the latter being definitely expressed, lawful, and not injurious ought to be adhered to. The C. A. based their decision on the ground that circumstances had so altered that anything like rigid adherence to the words of the testatrix's will would defeat "the principal object which she had in view as distinguished from the means by which she wished that object to be carried out." The increase in the value of the property had been enormous, but the change in the whole circumstances and condition "of the parish of Kensington" had been infinitely greater, so that it required some exercise of the imagination to adequately realize it. "The then village of Kensington was a small village about a mile and a half from Hyde Park Corner, and in old documents it is called a village. Now it is what we know it, a suburb of London, very thickly inhabited with many thousands of people, and containing a large number of houses of great magnitude and value, inhabited by wealthy people. The whole of the circumstances of the place have changed. That which was a provision for the poor inhabitants of a village is now a provision for the numerous inhabitants of this large town or part of a town."

changes in habits,

"Again," the judgment continues, "circumstances have changed in another way. The habits of society have changed, and not only men's ideas have changed, but men's practices have changed, and in consequence of the change of ideas there has been a change of legislation; laws have become obsolete or have been absolutely repealed, and habits have become obsolete, and have fallen into disuse, which were prevalent at the times when these wills were made. The change, indeed, has become so great in the case that we are considering, that it is eminently a case for the application of the *cy-près* doctrine, if there is nothing to prevent its application."

ideas on pauperism,

As for the "doles," that which might have been reasonable enough more than 200 years ago, when 50 shillings were to be given half-yearly among a few poor people in a small parish, "would be intolerable on a large scale in a large town like Kensington." "There is no doubt that it" (the system of doles) "tends to demoralize the poor and benefit no one. . . . The extension of doles is simply the extension of mischief. . . . It seems to me, when you consider the change in the amount of money and the change in the surrounding circumstances, you cannot impute to the testatrix an intention to distribute this large sum in the way I have mentioned."

and industrial conditions,

As for apprenticeship:—"Now it is said that as regards the apprenticing of the poor boys, we are to apply £1100 a year in exactly the same way that the testatrix directed £5 a year to be paid. In giving £5 a year to apprentice one poor boy or more, she evidently thought that there might occasionally be a chance of more than one boy; . . . but did she imagine, or can anybody suppose she imagined, she was going to provide £1100 a year to apprentice any number of boys that might be living in that parish?" And further, under 5 Eliz. cap. 4, no one could exercise a trade without being apprenticed. "All that legislation has been repealed—so the case falls within the principle laid down by Lord Westbury in *Clephane* v. *Lord Provost of Edinburgh* (L. R. 1 H. L. Sc. 417), where the means to the end required a change, the end (that of educating the poor of the parish so as to enable them to obtain a living) being kept in view."

demand a sacrifice of the letter to the spirit;

"To confine," says James, L.J., "the application of that charity in the present state of things, in the present state of feeling, and the present state of the law to those persons only among the poor of Kensington whose children would be willing to become apprentices to tradesmen or otherwise, and to exclude from the charity all that other mass of poor people who have got the same claim, and who do not now find it beneficial for their children to be put out as apprentices, would be, in fact, to exclude from the charity the great majority of that class of poor whom, it is obvious to my mind, Lady Campden contemplated as recipients of the benefit of the charity, and in doing that we should be in truth defeating the spirit of Lady Campden's gift by following strictly the letter, when that letter has become inapplicable."

new details being left to the Charity Commissioners.

Finally the trustees of Lord Campden's charity had used their discretion to submit to the Charity Commissioners; and the Charity Commissioners had a discretion conferred on them by the legislature. Therefore it would not be "sufficient for a judge to say he thought some detail might well be different, or that if he himself had originally settled the scheme he should have put in some others than those which are specified in the scheme. He must be satisfied that the Charity Commissioners have gone wrong, either by disobeying those rules of law which govern them, as well as they govern Courts of justice, or else that there has been some slip or gross miscarriage which calls for the intervention of the Court to set aside and remodel the scheme."

Division of subject.

It is proposed to discuss the questions which the l.c. suggests under four heads: (1) The reason why; (2) the purpose for which, and (3) the objects for whose benefit *cy-près* exists; and (4) its exercise by the Charity Commissioners.

(1) Rule against perpetuities.

(1) Ordinary gifts are void if they infringe the rule against perpetuities (*post*, p. 108). This rule forbids the postponement of the vesting of real or personal property for an estate in fee simple, in tail or absolute interest, during a longer period than lives in being and twenty-one years after, an extension being allowed for gestation if gestation exists. The lives must be ascertainable, *In re Moore* ([1901] 1 Ch. 936), and there must be some one capable of disposing of the entire property within this definite period, otherwise the gift violates the policy of the law (which favours alienation), and is void. But the policy of the law favours charities still more; accordingly, the rule is (*a*) that gifts to a charity do not fail although they exceed the period within which ordinary gifts must take effect. This rule is (*b*) subject to an exception, which is that if the occurrence of an event is a condition precedent of the gift, the event must necessarily occur within the period prescribed by the rule: *In re Lord Stratheden and Campbell* ([1894] 3 Ch. 265). In *In re White's Trusts* (33 Ch. D. 449) the legacy was to the Tinplate Workers' Company, upon trust, to build almshouses for tinplate workers "when" a proper site could be obtained, and "in the hope that" when built, the almshouses would be endowed. The words "when" and "in the hope that" were treated as conditions precedent, and as such were subject to the ordinary rules of law against remoteness, etc.; the gift was therefore void. Advocates of the gift cited *Chamberlayne* v. *Brockett* (8 Ch. 206), followed in *In re Gyde* (79 L. T. 261), but there the condition ("when land shall be given" for the almshouses) referred only to one of several modes of effectuating the charitable gift. So too if the donee is a non-charitable group of persons, such as a club, convent, or

corps of commissionaires, and donor intended that they should control the entire fund, but suggested a method of enjoyment which infringed the rule the donee would take discharged from the suggested condition: *In re Clarke* ([1901] 2 Ch. 110)†, citing *Cocks* v. *Manners* (12 Eq. 586). (*c*) And this exception is subject to an exception when the condition precedent which invests one charity is a condition subsequent divesting another charity. On this ground, also, *Chamberlayne* v. *Brockett* can be explained; and by this means testators may keep their own tombs in repair: *In re Tyler* ([1891] 3 Ch. 252). For a charity can be divested by a condition subsequent, which transgresses the perpetuity limit; thus there may be a gift to a school until national education is established, and then a gift over to A.; the condition subsequent is good, even though national education may at the date of the gift be a dream of the future; but it does not follow from that that A. can take. If the charity involves a perpetuity A. cannot take, unless of course A. happens to be a charity, *In re Bowen* ([1893] 2 Ch. 491), or (possibly) where donor declares that if the gift fails the trusts shall result: *Walsh* v. *Sec. for India* (10 H. L. C. 367). This last case was applied by North, J., to a gift to a church until its priest preached otherwise than in black: *In re Robinson* (1892, 1 Ch. 95; 1897, 1 Ch. 85); *In re Randell* (38 Ch. D. 213). But *Walsh* v. *Sec. for India* is not clear. It was argued as a resulting trust: and the decision (which ignored the rule against perpetuities) was on the covenant. Moreover, a condition subsequent divesting a charity in favour of donor's heirs was assumed to be invalid *in toto* in *In re Hollis' Hospital (Trustees) and Hague's C.* ([1899] 2 Ch. 540). And contrast *In re Richardson* (35 W. R. 710) (see Note I). (*d*) *Cy-près* is a corollary to this rule, these exceptions and these exceptions to exceptions. Because a charitable gift may be perpetual, it is necessary to revise its terms from time to time.

(2) Rules as to uncertainty

(2) *Cy-près* exists for the protection of charitable gifts when first made. Many charitable gifts would be void for uncertainty as to the objects to take—like those non-charitable gifts in *In re Stephenson* ([1897] 1 Ch. 75); *In re Groom* ([1897] 2 Ch. 407)—if the Court or the Commissioners were not at hand to fill in details. The following are cases in which it was held that a gift to charities in general must be supplemented by a scheme directed by the Court. In the first two cases it was as though the testator made a frame, and the Court painted in the picture. In the third case it was as though the Court painted out the picture which the testator painted, and painted in one of its own.

Testator directed his residue "to be given by my executors to such charitable institutions as I shall by any future codicil give the same, and in default of any such gift, then to be distributed by my executors at their discretion:" *Pocock* v. *A.-G.* (3 Ch. D. 342). After "to be distributed by my executors" the Court supplied the words "in charity," and executed the trust; compare *Dolan* v. *Macdermot* (3 Ch. 676); *In re Sutton* (28 Ch. D. 464).

In *In re White* ([1893] 2 Ch. 41), the testator gave property "to the following religious societies, viz.:" then a blank followed. The C. A. upheld the gift although not all religious societies are charitable, and the gift would be void for uncertainty in the case of non-charitable religious societies. Compare gifts "to the poor and the service of God:" *In re Darling* ([1896] 1 Ch. 50). Contrast gifts to "charitable *or* philanthropic" purposes: *In re Macduff* (1896, 2 Ch. 451), citing *Morice* v. *Bishop of Durham* (10 Ves. 522)*. The word "or" in this connection is discussed in *Hunter* v. *A.-G.* ([1899] A. C. 309, 323, 324); *In re Delmar C. T.* ([1897] 2 Ch. 163).

In *Biscoe* v. *Jackson* (35 Ch. D. 460) a testator directed £10,000 to be applied in the establishment of a Soup Kitchen and Cottage Hospital for Shoreditch "in such a manner as not to violate the Mortmain Acts." Land in mortmain could not be obtained in Shoreditch. The Court held there was a general charitable intention, that the trusts should be executed *cy-près*, and directed a scheme (see Note II.).

or impossibility of execution.

And *cy-près* not only interposes to save charitable gifts at their birth, but to save them from an untimely end. Thus if the following cases had not been charities the Crown, *Cunnack* v. *Edwards* ([1896] 2 Ch. 679), or donor's representatives (see *post*, p. 61), might have claimed the property.

In *Wilson* v. *Barnes* (38 Ch. D. 507) a wood was granted by its owner for providing timber in order to repair sea-dykes. In process of time the sea receded, the dykes were no longer needful, and the wood was all cut down. The purpose and subject-matter of the gift were no more. The Court diverted the land to other charitable purposes.

In the *Mayor of Lyons* v. *Adv.-G. of Bengal* (1 A. C. 91) testator gave funds *inter alia* for the relief and release of imprisoned debtors at Calcutta and a residuary gift to other charities. Imprisonment for debt was abolished at Calcutta (after testator's death). It was held that the *cy-près* doctrine was applicable to the gift whose purpose had failed, and that the residuary gift (although a gift to charities) did not operate upon these funds. Compare *A.-G.* v. *Hankey* (16 Eq. 140, n.); *In re Prison Charities* (16 Eq. 129).

In *In re Slevin* ([1891] 2 Ch. 236), the charitable legatee ceased to exist before the legacy was paid over to it, but after the testator's death; and it was held, following *Hayter* v. *Trego* (5 Russ. 113), that *cy-près* preserved the gift for some charity or other, and that it did not fall into the residue. The Court decided in favour of the A.-G., "not on the ground that there is such a general charitable intention that the fund should be administered *cy-près*, even if the charity had failed, in the testator's lifetime, but because, as the charity existed at the testator's death, this legacy became the property of that charity, and on its ceasing to exist, its property falls to be administered by the Crown, who will apply it according to custom for some analogous purpose of charity."

Cases of lapse must be distinguished.

In A. G. v. *Day* ([1900] 1 Ch. 31) the Court diverted a road-repairing trust to a County Council. These principles cannot be stretched so as to prevent lapse during testator's lifetime. See *In re Ovey* (29 Ch. D. 560), where the ophthalmic hospital, *In re Rymer* ([1895] 1 Ch. 19), where the London seminary predeceased testator; although the persons benefiting by the latter removed to a similar institution at Birmingham. (Lapse may occur under gifts by deed as well as under gifts by will: *In re Tilt* (74 L. T. 163).)

Rule as to surplus income.

Cy-près is also the means whereby the unearned increment of a fund is devoted to charity. In 1558 a testator gave houses to a City company upon condition that it should spend £8 on specific charities and "the rest of the profits" on repairing the said houses. The net profits at the testator's death were £8 8*s.* Two centuries later the Court directed a scheme to be prepared for the administration of these profits: *A.-G.* v. *Wax Chandlers' Co.* (L. R. 6, H. L. 1)*. Compare *Merchant Taylors Co.* v. *A.-G.* (6 Ch. 512). The respondents in this case had contended that they took beneficially subject to certain liabilities. It was urged against them that the testator must have thought that the condition exhausted the profits, so that his bequest ought to be construed as a trust of the whole estate. When once a property, however small, is given to some charitable purposes, its produce, however large, is given to charity through the machinery of *cy-près.*

Rule as to preserving endowments.

Cy-près has also been used to preserve the endowments of Dissenting congregations. Since 7 & 8 Vict. c. 45, twenty-five years' usage in any congregation is, in the absence of express provisions to the contrary, decisive as to who are entitled to the endowments; thus funds for Positivists might under this law be gradually diverted to Anabaptists, supposing that the former developed into the latter. Independently of statute, *cy-près* can secure a similar result: *A.-G.* v. *Bunce* (6 Eq. 563). But for statute and *cy-près*, the endowments would be blown clean away by the faintest breath of new doctrine.

(3) What are charities?

Definitions by Statute,

(3) What are charities? The Court (9 Ves. 405) regards all objects as charitable which are (*a*) expressly enumerated in the preamble to the statute of charitable uses (43 Eliz. c. 4), re-enacted by 51 & 52 Vict. c. 42, s. 13, or which are (*b*) deemed by analogy within its spirit and intendment. They are "relief of aged, impotent and poor people; maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities; repairs of bridges, ports, havens, causeways, churches, sea-banks and highways; education and preferment of orphans, relief, stock or maintenance for houses of correction; marriage of poor maids; supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; relief or redemption of prisoners or captives; aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes."

Sect. 66 of the *Charitable Trusts Act*, 1853, and sect. 14 of the *Charitable Trustees Incorporation Act*, 1872, defines charity by reference to 43 Eliz. c. 4. The Charity Commissioners have also gleaned miscellaneous rights from various Acts, such as power over allotments under ss. 8, 9, 10, 11, of the *Allotments Ext. Act*, 1882, s. 13 of the *Allotments Act*, 1887, and s. 18 of the *Commons Act*, 1899, and the supervision of non-ecclesiastical charities, including allotments held by rural parishes under the *Local Government Act*, 1894, ss. 8, 14, 70, 75; and by boroughs under the *London Government Act*, 1899, s. 23.

Case-law, (educational)

Recent cases show no disposition to narrow down the wide interpretation of the word in the older cases (see, *e.g.*, Jarman on Wills, 5th ed. pp. 166, 169). Thus charities include educational trusts, *In re Gilchrist, E. T.* ([1895] 1 Ch. 367); *Rooke* v. *Dawson* ([1895] 1 Ch. 480); Clifford's Inn, *Smith* v. *Kerr* (1900, 2 Ch. 511), the advancement of learning, *Whicker* v. *Hume* (7 H. L. C. 124), but not bookworms, *ib.*; a Tory village reading-room, *In re Scowcroft* ([1898] 2 Ch. 638), if not kept up by subscriptions, *In re Dutton's Will* (4 Ex. D. 54); the Royal National Lifeboat Institution, *In re Richardson* (*ubi supra*), the Miners' Relief, York Theatrical, and other friendly societies, *Spiller* v. *Maude* (32 Ch. D. 158 n.); *Pease* v. *Pattinson* (32 Ch. D. 154); *In re Buck* ([1896] 2 Ch. 727); *In re Lacy* ([1899] 2 Ch. 149), but not Trades Unions, *In re Amos* ([1891] 3 Ch. 159), nor a club for the relief of widows of members, *Cunnack* v. *Edwards* ([1896] 2 Ch. 679), nor benevolent, *James* v. *Allen* (3 Mer. 17); *In re Jarman's E.* (8 Ch. D. 584), philanthropic, *In re Macduff* ([1896] 2 Ch. 451), nor generally useful purposes, *Kendall* v. *Granger* (5 B. 300); "old and worn-out" clerks, *In re Gosling* (48 W. R. 300), "spinsters over sixty" *In re Dudgeon* (74 L. T. 613), Unitarians over fifty, *In re Wall* (42 Ch. D. 510), workmen's dwellings let below cost price, *In re Sutton* ([1901] 2 Ch. 640), poor relations, *A.-G.* v. *Duke of Northumberland* (7 Ch. D. 745), Volunteer Corps, *In re Lord Stratheden and Campbell* ([1894] 3 Ch. 265), Rifle Association, *In re Stephens* ([1892] W. N. 140), Corps of Commissionaires, *In re Clarke* ([1901] 2 Ch. 110), Salvation Army, *In re Lea* (34 Ch. D. 528); Moravian Missions, *C. I. Tax* v. *Pemsel* ([1891] A. C. 531), any religious society, *In re White* ([1893] 2 Ch. 41), except "a society for the promotion of private prayer and devotion by its own members, and which has no wider scope, no public element, no purposes of general utility" (*ib.* 51): thus sisters of charity, but not a Dominican convent, *Cocks* v. *Manners* (12 Eq. 574): nor is the purchase of advowsons charity, *Hunter*, v. *A.-G.* ([1899] A. C. 309), unless for a trust (*ib.* pp. 322, 323). And it includes Vegetarian Societies, *In re Cranston* ([1898] 1 Ir. R. 431), "Societies for the Prevention of Cruelty to Animals," and of vivisection, but not the maintenance of animals: *In re Dean* (41 Ch. D. 552); *In re Douglas* (35 Ch. D. 472); *In re Foveaux* ([1895] 2 Ch. 501).

(philanthropic)

(public)

(religious)

(philozoic)

(etc.)

It is charity to repair roads, *A.-G.* v. *Day* ([1900] 1 Ch. 31), sea-dykes, *Wilson* v. *Barnes* (38 Ch. D. 507), a churchyard, *In re Vaughan* (33 Ch. D. 187), but not a tomb in a churchyard, *Fisk* v. *A.-G.* (4 Eq. 521); *In re Tyler* ([1891] 3 Ch. 252); *In re Rogerson*, ([1901] 1 Ch. 715) (residue to charity), nor to repair pictures, *In re*

Gassiot ([1901] W. N. 23) (residue to persons). Charity is an active, not a "cloistered virtue:" *Cocks* v. *Manners, Whicker* v. *Hume* (*ubi supra*).

It might be charity to permit the freemen of a borough to dredge for oysters and sell what they catch during two months in the year: *Goodman* v. *Mayor, etc., of Saltash* (7. A. C. 633, 642)*; *In re Christchurch Inclosure Act* (38 Ch. D. 520); *In re Norwich T. Charity* (40 Ch. D. 298); but sport is not charity: *In re Nottage* ([1895] 2 Ch. 649).

by Lord Macnaghten.

"Charity," said Lord Macnaghten in *C. I. T.* v. *Pemsel* ([1891] A. C. 531, 583), "in its legal sense, comprises four principal divisions: trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed every charity that deserves the name must do either directly or indirectly." In this case Lord Halsbury, L.C., and Lord Bramwell expressed their belief that what was charity in England was not charity in Scotland; but the majority of the House of Lords decided that the Tweed made no difference in the meaning of the word.

Non-ecclesiastical charities.

The *Parish Councils Act*, 1894, s. 14, enables the parochial council to nominate trustees along with other trustees of unecclesiastical charities as defined s. 75. This distinction was discussed in *In re Perry Almshouses* ([1899] 1 Ch. 21); *In re Spenluffe's Charity* (83 L. T. 498), and also exists under the *London Government Act*, 1899.

(4) Powers of Charity Commissioners,

(4) The Court of Chancery had an inherent jurisdiction with regard to charities: *Incorporated Society* v. *Richards* (1 D. & War. 258, 308); *A.-G.* v. *St. John's Hospital, Bedford* (2 De G. J. & S. 621); and one of the subjects specially assigned to the Chancery Division by sect. 34 (3), of the *Judicature Act*, 1873, is "the execution of trusts charitable." The Acts relating to Charitable Trusts, 1853–94, have now relieved the Ch. D. of a part of the duties incident to this jurisdiction.

resemble the powers of the Chancery Division;

The judicial and quasi-judicial powers conferred on the Charity Commissioners by these Acts are modelled on the powers possessed by the Ch. D. after an order for the administration of a trust estate. They demand (annual) accounts, inquire into details, give advice which confers indemnity, and sanction leases, mortgages, and sales which would be otherwise illegal. Subject to an appeal to the Ch. D., they appoint and remove trustees, and make vesting orders: *C. T. Act*, 1860, ss. 2, 4, 8, 9. Resistance to inquiry is punishable as "a contempt of the High Court of Chancery:" *C. T. A.*, 1853, s. 14; 1855, s. 9, etc. Indeed, they have, in some respects, more power than a Chancery Court. Since 1872 they have exercised, though rarely, the right to incorporate trustees. When an application for a scheme has been made under the *Act* of 1860 (ss. 2, 4), the application cannot be withdrawn; the applicant, unlike an ordinary plaintiff, is not *dominus litis*: *In re Poor's Lands Charity* ([1891] 3 Ch. 400). Although application by a trustee or persons interested is usually necessary before they can introduce a new scheme, in certain cases, *e.g.* in the case of certain schools endowed more than fifty years ago, *Endowed Schools Act*, 1869, and in the case of the endowments of certain dissolved municipal corporations (46 & 47 Vict. c. 18) and City parochial charities (46 & 47 Vict. c. 36), they prepare new schemes on their own initiative. Again, under sects. 17 and 19 of the Act of 1853, no private person can take proceedings to enforce a charitable trust without obtaining the certificate of the Commissioners; although (*Llanbadarnfawr* v. *Off. Trustee of C. T.* ([1901] 1 Q. B. 430)) the Court ought not to dismiss an action on that ground without giving plaintiff an opportunity of ascertaining whether the Commissioners will grant the necessary certificate: *Rendall* v. *Blair* (45 Ch. D. 139), *Braund* v. *Earl of Devon* (3 Ch. 800), explained in *Fisher* v. *Jackson* ([1891] 2 Ch. 84), and in *Rooke* v. *Dawson* ([1895] 1 Ch. 480).

But the discretion of the Charity Commissioners (1) is still subject to review by the Court if abused within the meaning of the leading case (compare *In re Burnham National Schools* (17 Eq. 241)); (2) their jurisdiction is not co-extensive in area with that of the Ch. D. Sect. 62 of the Act of 1853 totally exempts (*inter alia*) universities, colleges, cathedrals and collegiate churches, buildings registered and used for religious worship (compare 57 & 58 Vict. c. 35), Queen Anne's Bounty, and the British Museum; friendly societies, schools, *In re Stockport Ragged, etc., Schools* ([1898] 2 Ch. 687), religious and other societies are partially exempted, *i.e.* in so far as they are maintained by voluntary subscriptions or gifts applicable as income. No scheme interfering with an educational endowment less than fifty years old may be made except by consent of the trustees E. S. A., 1869: *A.-G.* v. *Christ's Hospital* ([1896] 1 Ch. 879). And so on.

but are subject to three qualifications.

(3) Their jurisdiction only arises when there are endowments (ss. 62, 66 of the Act of 1853). Endowments do not necessarily mean permanent endowments, *In re Sir Robert Peel's School* (3 Ch. 543), but will include the case of a gift applicable at any moment as income, if its trustee has treated it, and intends to treat it, as income-producing capital, *In re Gilchrist Educational T.* ([1895] 1 Ch. 376), except in the case of mixed charities, *i.e.* charities partly supported by voluntary subscriptions. In the case of mixed charities they can only interfere when the trustees are bound to separate the gift into capital and income: *In re Clergy Orphan Corp.* ([1894] 3 Ch. 145). If on either of the above grounds the jurisdiction of the Commissioners is ousted, it is the practice of the Court to direct payment of the fund to the trustee, sometimes giving leave to apply: *In re Lea*, *In re Richardson*, *supra*; *Warren* v. *Clancy* ([1898] 1 Ir. R. 127), *post*, p. 167; or, in cases where the trustee has repudiated his trust, the Court will direct a scheme: *Pocock* v. *A.-G.* (3 Ch. D. 342).

Foreign trusts.

If the trust has to be executed abroad the Court pays the money to the trustee, *A.-G.* v. *Sturge* (19 B. 597)†: see p. 4, or if he disclaims, *cy-près* is inapplicable, and that gift fails: *New* v. *Bonaker* (4 Eq. 655). The jurisdiction of the Charity Commissioners extends to such trusts and probably to foreign trusts to be executed here: *In re Duncan* (2 Ch. 356).

See generally Tudor's Law of Charities and Mortmain, 3rd ed.; Seton, pp. 1083–1148.

NOTE I.—*Accumulations Acts.*

In *Wharton* v. *Masterman* ([1895] A. C. 186) the Accumulations Acts, 1800, 1892, which forbid accumulations of income for more than twenty-one years from the death of the settlor or testator, or for the other periods therein-mentioned, and enacts that it is only the direction to accumulate beyond the period which is void, and the principle that beneficiaries (if any), *In re Travis* ([1900] 2 Ch. 541); *In re Pope* ([1901] 1 Ch. 64), can claim immediate enjoyment of such accumulations whether legal or illegal, was held applicable to charities as well as to individuals. See *Pirbright* v. *Salwey* ([1896] W. N. 86), *infra*, p. 108.

NOTE II.—*Mortmain Acts.*

Since 1217 restrictions have been placed on conveyances or devises to uses which eventually included "charitable uses" by the Mortmain Acts. These Acts were consolidated and amended (51 & 52 Vict. c. 42), and the latter was amended (54 & 55 Vict. c. 73). Under the first Act assurances, if voluntary, must reserve nothing except as therein stated for the assuror; all assurances must be made by deed executed in the presence of two witnesses twelve months before the death of the assuror, and enrolled within six months of execution. These provisions apply to personalty, subject to a trust for conversion, and the requirements are slightly different in the case of stock. (See as to what constitutes "an interest in land," sect. 3 of the Act of 1891, and *In re Pickard* ([1894] 3 Ch. 704); *In re Parker* ([1891] 1 Ch. 682; *In re Hamilton* ([1896] 2 Ch. 617); *In re Crossley* ([1897] 1 Ch. 928)). These provisions no longer apply to wills since the Act of 1891, *In re Hume* ([1895] 1 Ch. 422), which can, since the date of the Act, *In re Bridger* ([1894] 1 Ch. 297), pass land; but the land, if not sold within a year of testator's death, or within such additional period as the Charity Commissioners of Court prescribe, *In re Sidebottom* ([1901] 2 Ch. 1), will be forthwith sold by or under the direction of the Charity Commissioners. The Court may also order the permanent retention of land necessary for the charity: *In re Sutton* ([1901] 2 Ch. 640).

Trusts in Fraud of Creditors, or Voluntary Settlements.

FREEMAN *v.* POPE.

(L. R. 5 Ch. 538.)

Principle.

A voluntary settlement may be set aside under 13 *Eliz. c.* 5, *without proof of actual intention to defeat, hinder or delay creditors, if, under the circumstances, the instrument will necessarily have that effect.*

Summary of facts.

The settlor, who was under pressure from his creditors, made a voluntary settlement of such an amount of his property as to render the residue insufficient to pay his creditors at that date. The settlement was set aside at the suit of a person who subsequently became his creditor.

Under 13 Eliz. c. 5.

A declaratory Act.

The statute 13 Eliz. c. 5 makes all conveyances of lands or goods, or any lease thereof or profit thereout, made with intent to delay, hinder, or defraud creditors, void against the creditors, but exempts *bonâ fide* purchasers for value without notice. Lord Mansfield's statement in *Cadogan* v. *Kennett* (Cowp. 432) that this principle is declaratory of the Common Law has often been adversely criticised. Every case of any importance on this statute has been decided by a Court of Equity or latterly by the Bankruptcy Court. Two-thirds of the former class of cases were suits to set aside a deed, and no distinction was drawn between the general jurisdiction of Equity to set aside deeds on the ground of equitable (not common law) fraud and its jurisdiction under this statute. The remaining third consisted of administration suits in which Equity applied its own doctrine that men "must be just before they are generous, and that debts must be paid before gifts can be made:" per Lord Hatherley in the l.c. Bankruptcy principles are in this matter indistinguishable from those of a Court of Equity.

This is the leading

The l.c. is the chief authority for the peculiarly equitable distinction between presumptive and actual fraud. In *In re Ridler* (22 Ch.

case, not for actual,

D. 74), Jessel, M.R., in the course of the argument (p. 78), asked, "Do you dispute the law as laid down in *Freeman* v. *Pope?*" and was at once met by an emphatic negative. James, V.C., felt a difficulty whether if the case had come before him as a special juryman, he could have arrived at the conclusion that the settlor had any intention to defeat or delay his creditors. On this point the C. A. stated that, the fact being once established that the settlor had not left sufficient property outside the settlement to pay his debts, it was unnecessary "to speculate as to what was passing in his mind."

but for presumptive fraud on creditors.

"There is," said Giffard, L.J., "one class of cases in which an actual and express intent is necessary to be proved, as in *Holmes* v. *Penney* (3 K. & J. 90) and *Lloyd* v. *Attwood* (3 De G. & J. 614), where the instruments sought to be set aside were founded on valuable consideration; but where the instrument is voluntary, then the intent may be inferred in a variety of ways. For instance, if after deducting the property which is the subject of the voluntary settlement, sufficient available assets are not left for the payment of the settlor's debts, then the law infers intent, and it would be the duty of a judge, in leaving the case to the jury, to tell the jury that they must presume that that was the intent. Again, if at the date of the settlement the person making the settlement was not in a position actually to pay his creditors, the law would infer that he intended, by making the voluntary settlement, to defeat and delay them." This statement of the law agrees with that of Lord Westbury in *Spirett* v. *Willows* (3 D. J. & S. 293), of Kindersley, V.C., in *Jenkyn* v. *Vaughan* (3 Dr. 419), and Vaughan Williams, J., *In re Tetley* (3 Mans. 226, 233), and has been applied in *Taylor* v. *Cœnen* (1 Ch. D. 636), *Ex p. Huxtable* (2 Ch. D. 54), etc., and has not been questioned except by some *obiter dicta* of Lord Esher, M.R., in *Ex parte Mercer* (*ubi infra*).

Against whom void.

Since the leading case creditors, subsequent to the date of the settlement, can impeach it. Compare *Taylor* v. *Cœnen* (1 Ch. D. 636); the *dicta* in old cases to the opposite effect (*e.g.* by Sir W. Grant in 12 Ves. 155) are no longer law. Voluntary creditors have the same rights as creditors for value: *Adames* v. *Hallett* (6 Eq. 468).

How far void.

A settlement is only avoided under 13 Eliz. for the purpose of satisfying creditors: *Curtis* v. *Price* (12 Ves. 89, 103). If avoided because it is voluntary it is avoided subject to interests (if any) for which value was given: *Smith* v. *Cherrill* (4 Eq. 390). Bankruptcy in these matters follows the same rule in applying the Bankruptcy Act (see Note 1): *Ex p. Sheffield* (3 Mans. 340).

Although the statute says "void," it in reality means "voidable," so that mesne transactions for value—whether legal or equitable—are protected just as they would be in an action for rescission based on general equity: *Halifax Banking Co.* v. *Gledhill* ([1891] 1 Ch. 31).

Cases, too, under the Bankruptcy Acts proceed on the principle that the settlement is in reality voidable, not void; so that mesne transactions for value down to the date of the bankruptcy are similarly protected: *In re Carter and Kenderdine's C.* ([1897] 1 Ch. 776).

Such transactions include trustees' lien for costs, *Ex p. Russell* (19 Ch. D. 588); *In re Holden* (20 Q. B. D. 43); *Merry* v. *Pownall* ([1898] 1 Ch. 306); purchases whether without, *In re Vansittart, Ex p. Brown* ([1893] 2 Q. B. 377), or with notice that the settlement was voluntary: *In re Brall, Ex p. Norton* ([1893] 2 Q. B. 381). *In re Briggs and Spicer* ([1891] 2 Ch. 127) is overruled ([1897] 1 Ch. 776).

Mesne proceedings in lunacy are similarly protected, and the rule that a lunatic's obligations are postponed to his needs—although it does not affect funds in Court charged by creditors, *In re Leavesley* ([1891] 2 Ch. 1); *In re Brown* ([1900] 1 Ch. 489), seized under a fi. fa., *In re Clarke* ([1898] 1 Ch. 336)*, or already possessed by the trustee in bankruptcy, *In re Farnham No.* 2 ([1896] 1 Ch. 836), and does not affect existing equities, *Davies* v. *Thomas* ([1900] 2 Ch. 462)—puts lunatic's assets (including assets given by him by a gift void in bankruptcy) now under control of the Lunacy Court, out of reach of execution creditors and the Bankruptcy Court: *In re Plenderleith* ([1893] 3 Ch. 332); *In re Winkle* ([1894] 2 Ch. 519) (order); *In re Farnham No.* 1 ([1895] 2 Ch. 799), approving *Sanguinetti* v. *Stuckey's Banking Co.* ([1895] 1 Ch. 176).

What is a settlement for value?

The above rules of presumptive fraud and of *pro tanto* avoidance open up the question, What is a voluntary settlement? We append eight useful rules or examples.

i. Conveyances of leaseholds are not for value merely because there are onerous covenants attached, *In re Duke of Marlborough* ([1894] 2 Ch. 133); *In re Ridler* (22 Ch. D. 74), nor are other assignments *sub onere, e.g.* shares subject to calls (*ib.*), whether in equity or under 13 Eliz. (*ib.*), or in Bankruptcy, *Ex p. Hillman* (10 Ch. D. 622); *Ex p. Norton; In re Brall* ([1893] 2 Q. B. 381). Cases to the contrary, *Harris* v. *Tubb* (42 Ch. D. 79); *In re Doble* (38 L. T. 183), are obsolete, except cases like *Price* v. *Jenkins* (5 Ch. D. 619); *Hewison* v. *Negus* (16 B. 594); *Townend* v. *Toker* (1 Ch. 446), which are exclusively referable to the repealed statute 27 Eliz. c. 4: see Note II., and *A.-G.* v. *Jacobs-Smith* ([1895] 2 Q. B. 341)*, questioning *Gale* v. *G.* (6 Ch. D. 144).

ii. A separation deed is for value if a compromise, *Hobbs* v. *Hull* (1 Cox. 445); *Hart* v. *H.* (18 Ch. D. 670); *McGregor* v. *M.* (21 Q. B. D. 424), or accompanied by any indemnity against wife's debts, costs, &c., *ib.*, *Gibbs* v. *Harding* (5 Ch. 336).

iii. So is a family arrangement where assign covenants to pay assignor's debts and maintain her: *In re Johnson* (20 Ch. D. 389); *Wakefield* v. *Gibbon* (26 L. J. Ch. 505); *secus* if no value passes, *Penhall* v. *Elwin* (1 Sm. & G. 258). See *post*, p. 110.

iv. Consideration may be sought in related documents whether they do or do not expressly refer to one another: *Harman* v. *Richards* (10 Ha. 81); *Thompson* v. *Webster* (4 L. T. N. S. 750); *Atkinson* v. *Smith* (28 L. J. Ch. 2); *Gale* v. *Williamson* (8 M. & W. 405); *Hance* v. *Harding* (20 Q. B. D. 732) (cited in *Mackintosh* v. *Pogose* ([1895] 1 Ch. 509).

v. A post-nuptial settlement is not for value because it recites an ante-nuptial agreement: *In re Holland* ([1901] 2 Ch. 145).

vi. Beneficiaries under one document may fall into two classes—those for value and volunteers: *French* v. *F.* (6 D. M. & G. 95). Settlor's fathers-in-law, brothers, illegitimate issue, and (if the husband) children by a former marriage are volunteers even under 27 Eliz. c. 4. *In re Cameron and Wells* (37 Ch. D. 32); *De Mestre* v. *West* ([1891] A. C. 264). Compare *Mackie* v. *Herbertson* (9 A. C. 303). These decisions apply *à fortiori* to general law, *A.-G.* v. *Jacobs-Smith* ([1895] 2 Q. B. 341)*, which also regards a widow's issue as volunteers under her remarriage settlement.

vii. Post-nuptial settlements by persons married under the old law are for value under 27 Eliz. c. 4, *Teasdale* v. *Braithwaite* (5 Ch. D. 630); *In re Foster and Lister* (6 Ch. D. 87), compare *Marshall* v. *M.* (5 P. D. 23), unless the husband gives up nothing, as in *Shurmur* v. *Sedgwick* (24 Ch. D. 597). See now s. 47 of the *Bankruptcy Act* (Note I.).

viii. A trustee commits breaches of trust, and then (*a*) vests the trust property in self and P. as trustees; (*b*) conveys it to make good the breach. These conveyances are for value, (*a*) *Taylor* v. *London, etc., Banking Co.* ([1901] 2 Ch. 257), (*b*) *Taylor* v. *Blakelock* (32 Ch. D. 560); *Sharp* v. *Jackson* ([1899] A. C. 419).

See Davidson's Precedents (ed. 3, vol. iii. p. 668).

In the following cases voluntary deeds were set aside :—

Cases of voluntary conveyances set aside.

(1) A father gave a bank a written guarantee for repayment of the balance on his son's account not to exceed £1000. Five years afterwards, when the son's account was overdrawn by £1500, the father made a voluntary settlement on himself for life with remainders over of nearly the whole of his property, except a debt due from the son to him of £1500. The son subsequently became bankrupt, and after the father's death the settlement was set aside at the instance of the bank: *In re Ridler* (22 Ch. D. 74); *Adames* v. *Hallett* (6 Eq. 468).

(2) A solvent trader (T.) made a voluntary settlement of all his property, present and future, reserving the control of his stock-in-trade to himself, and five years later became bankrupt: *Ware* v. *Gardner* (7 Eq. 317).

(3) T. colourably assigned his trade property to a creditor (C.): *Ex parte Chaplin* (26 Ch. D. 319); *French* v. *F.* (6 D. M. & G. 95); *In re Rayment* (80 L. T. 807). Contrast *Ex parte Barton* (*post*, p. 62).

(4) T. made a post-nuptial settlement at a time when he was about to embark in a new business of which he knew nothing, and failed six years later. His solvency at the date of the settlement was questionable: *Ex parte Russell* (19 Ch. D. 588), approving *Mackay* v. *Douglas* (14 Eq. 106); *Crossley* v. *Elworthy* (12 Eq. 158).

(5) A solvent debtor of weak mind was induced by his children to distribute his estate subject to an annuity. The children desired to defeat the creditors: *Cornish* v. *Clark* (14 Eq. 184). Contrast *In re Johnson* (*supra*, p. 55, iii.). See (14).

In the following cases voluntary deeds were upheld:—

Cases of voluntary conveyances upheld.

(6) The settlor's property was sufficient to pay creditors, and he had no intention to defeat or delay creditors: *Kent* v. *Riley* (14 Eq. 190).

(7) A ship's captain who had no debts made a post-nuptial settlement of a £500 legacy while there was an action for breach of promise pending against him. £500 damages were given against him in the action. As this liability was at the date of the settlement "highly speculative," the settlement was upheld: *Ex parte Mercer* (17 Q. B. D. 290). Compare *Reg.* v. *Hopkins* [1896] 1 Q. B. 652.

If the contingent liability at the date of the settlement "is so remote that it would not enter into any one's calculations, the existence of the contingent liability would not make a settlement bad. For instance, if a person had taken shares in the Glasgow Bank at a time when everybody believed them to be a valuable property, it would be difficult to hold that a settlement made by him while the bank was in good credit was invalid, though the liability ultimately turned out ruinous:" per Lord Selborne, in *In re Ridler* (*ubi supra*).

(8) A solvent non-trader, aged twenty-one, by revocable deed assigned all her property to trustees upon discretionary trusts to maintain her, pay her debts, etc.: *Ex p. Gimblett* ([1900] 2 Q. B. 508).

(9) A settlement to protect settlor against his own extravagance is valid: *In re Tetley*, 3 Mans. 226.

In the following cases deeds for value were set aside:—

Cases of conveyances for value set aside.

(10) Where in an ante-nuptial settlement there is evidence of an intent by all parties to defeat and delay creditors, and to make the celebration of marriage part of a scheme to protect property against the rights of creditors, the settlement is void: *Colombine* v. *Penhall* (1 Sm. & G. 228); *Bulmer* v. *Hunter* (8 Eq. 46) †; *Ex p. Pennington* (5 Mor. 268).

(11) A jury should suspect as shams, revocable deeds, *Tarback* v. *Marbury* (2 Vern, 510), false recitals, *Penhall* v. *Elwin* (1 Sm. & G. 258); and see (13), documents not transferred, *Bennet* v. *Musgrove* (2 Ves. 51); *Ward* v. *Lant* (Pr. Ch. 182), or inadequate value given, *Mathews* v. *Feaver* (1 Cox 278).

(12) T. sells to a one-man company, *i.e.* self, *In re Hirth* ([1899] 1 Q. B. 612).

In the following cases deeds for value were upheld:—

Cases of conveyances for value upheld.

(13) A settlor was insolvent, and the ante-nuptial settlement contained a false recital: the settlement was upheld because the wife was not a party to the intention to defraud creditors: *Kevan* v. *Crawford* (6 Ch. D. 29).

(14) The settlement is safe if purchaser has no intention to defraud, as in Roman law: *Holmes* v. *Penney* (3 K. & J. 90); *In re Johnson* (20 Ch. D. 389, 394). See (5).

(15) Settlor (S.) took money on loan from his wife but not for trade purposes, and settled part of it [and other money] on himself

until bankruptcy, then on his wife for life, &c. It was held that the wife's implied release of S. from the capital money so taken was value, and that the wife's *bona fides* protected the transaction [so far as her money was concerned]. (The words in brackets refer to the rule, which is also a rule of public policy, that a man may not settle his own property on himself until bankruptcy even for value): *Mackintosh* v. *Pogose* ([1895] 1 Ch. 505)*. Compare *In re Brewer's S.* ([1896] 2 Ch. 503); *Ex p. Brown* ([1897] 1 Q. B. 638); *Merry* v. *Pownall* ([1898] 1 Ch. 306); *In re Holland* ([1901] 2 Ch. 145).

(16) T. assigned his property to C. for past and future advances (seventeen months) before bankruptcy (under the old bankruptcy law): *Allen* v. *Bonnett* (5 Ch. 577).

Lâches.

The rule of acquiescence or lâches barring the remedy (*vigilantibus non dormientibus subvenit equitas*) does not apply to any of these cases, because they arise on a statute: *In re Maddever* (27 Ch. D. 523).

Note I.—*Settlements voidable in Bankruptcy.*

Bankruptcy Act, 1883.

Under sect. 47 of the *Bankruptcy Act*, 1883, all settlements except (1) ante-nuptial settlements, (2) settlements in favour of a *bonâ fide* incumbrancer or purchaser for value, (3) post-nuptial settlements of property acquired in right of the wife after marriage, are void against the trustee in bankruptcy if the settlor becomes bankrupt within two years of the date of settlement. They are also void if the bankrupt becomes bankrupt within ten years, unless the parties claiming under the settlement can prove (1) that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property settled; (2) that the settlor's interest in the property settled had passed to the trustee of the settlement on the execution thereof.

Gifts are settlements for bankruptcy purposes.

A "settlement" within the meaning of the Bankruptcy Acts includes gifts, *e.g.* of diamonds by a husband to his wife, *In re Vansittart, Ex p. Brown* ([1893] 1 Q. B. 181), and other gifts of things to be retained, *In re Tankard* ([1899] 2 Q. B. 57); or of money to be applied in a certain way, *Ex p. Harvey* (2) (2 Mor. 261), but not money gifts to buy a business, *Ex p. Harvey* (1) (15 Q. B. D. 682), *In re Plummer* ([1900] 2 Q. B. 790).

Payments of premiums on a voluntarily settled policy are not settlements: *Ex p. Whimney* ([1900] 2 Q. B. 710).

Note II.—*Settlements voidable under* 27 *Eliz.*

27 Eliz. 4 avoided voluntary conveyances of freeholds and copyholds as against purchasers for value. 56 & 57 Vict. c. 21 virtually repealed it.

[*Twyne's Case*, 1 Smith's Leading Cases, p. 1; May on Fraudulent Conveyances, ed. Worthington.]

Trusts for Creditors.

JOHNS *v.* JAMES.

(8 Ch. D. 744.)

Principle.

A trust deed by which property is conveyed for the benefit of creditors does not of itself create a trust for any of the creditors.

Summary of facts.

Meyrick, who owed Johns £3500, conveyed his property to James, and gave him a power of attorney to collect all his assets, upon trust to pay all debts due from Meyrick, including the £3500 due to Johns. Meyrick became bankrupt. James collected his assets, but did not pay Johns' debt. Johns then commenced an action against James claiming an account, and that the estate might be administered, and the debts of himself and other creditors satisfied. The C. A. decided that the action was not maintainable.

Garrard v. *Lord Lauderdale.*

In this case the Court re-established the authority of *Garrard* v. *Lord Lauderdale* (3 Sim. 1; 2 Russ. & My. 451)*. The Lords Justices in delivering judgment said that although in 1845 Knight Bruce, V.C., and in 1849 Wigram, V.C., indicated disapproval of that case, "thirty years have elapsed since the last of those *dicta* was pronounced; and *Wallwyn* v. *Coutts* (3 Mer. 707), *Garrard* v. *Lord Lauderdale*, and *Acton* v. *Woodgate* (2 My. & K. 492) have ever since been recognized and acted upon, and they were distinctly recognized and spoken of with approbation in the House of Lords by the Lord Chancellor and Lord Cranworth, in the year 1858, in the case of *Montefiore* v. *Browne* (7 H. L. C. 241)."

In *Garrard* v. *Lord Lauderdale* there was an assignment of certain personal property to trustees in trust to sell, and to pay certain scheduled debts not exceeding £50 each, and "to divide the residue among the several creditors . . . parties to the deed." Plaintiff was a scheduled creditor, but for £191 3*s.*, and the assignor's agent gave him notice of the deed. Neither he nor any other creditor executed, and so became a party to the deed. It was held that he acquired no rights under it, as it was "a private arrangement for the convenience of the debtor," and there was no trust for creditors. Shadwell, V.C., dealt, however, with the question of notice ambiguously, and Lord Brougham, L.C., ignored the difficulty.

These deeds create only revocable agency,

In the l.c. James, L.J., said: "It is quite obvious that a man in pecuniary difficulties, having a great number of debts which he could not meet, might put his property in the hands of certain persons to realize and pay the creditors in the best way they could. It was held in *Garrard* v. *Lord Lauderdale* that really after all that is only making those particular persons who are called trustees his agents or attorneys. There might be a power of attorney for them to realize all his property and relieve him from the difficulties he was in. If it were supposed that such a deed as that created an absolute irrevocable trust in favour of every one of the persons who happened at the time to be a creditor, the result might have been very monstrous. It would give him no opportunity of settling an action, no opportunity of getting any food for himself or his family the next day, or redeeming property pledged." And "the unfortunate trustee might have been liable to a thousand bills in Chancery, for he could not stop any of them till a judgment was made in favour of all the creditors." So that the deed was to be construed as a mandate. Similarly when a man gives his servant money with directions to pay a debt, that does not of itself create any right in favour of the creditor. The right to direct how and to whom the money is to be paid remains in the person who has put the money in the hands of the agent (comp. *Ex. p. Wreford* [1892] 1 Q. B. 872).

or mandate,

which circumstances may convert into an irrevocable trust for some or all the creditors.

Circumstances may, however, have occurred or may exist which transform the mandate into a trust in favour of some person or persons; *e.g.* "If the creditor," said James, L.J., "has executed the deed himself, and been a party to it, and assented to it—if he has entered into obligations upon the faith of the deed." And the trustee has power to convert his mandate into a trust by communicating its terms to a creditor. "The person to whom he communicates it of course has a legal right to have the money so applied, but that does not enure for the benefit of any other person or persons to whom no such communication has been made." Similarly Lord St. Leonards said in *Brown* v. *Cavendish* (1 Jon. & Lat. 606, 636), that a man may not create a trust for creditors, "communicate it to them, and obtain from them the benefit of their lying by until perhaps the legal right to sue was lost, and then insist that the trust was wholly within his power."

Meaning of Revocation.

If the trustee does not disclaim (*ante*, p. 16) or subsequently assents, the legal estate *plus* contingent equitable interests pass under the deed at the date thereof so as to bind third parties: *Siggers* v. *Evans* (5 E. & B. 367); *Glegg* v. *Rees* (7 Ch. 71); *Hobson* v. *Thellusson* (L. R. 2 Q. B. 642). He takes as trustee for the debtor unless or until some creditor—himself, for instance, *Wilding* v. *Richards* (1 Coll. C. C. 655) (surety)—becomes *c.q.t.*, in which case he becomes trustee for that creditor and subject thereto for the debtor: *Griffith* v. *Ricketts* (7 Ha. 307). If no creditor becomes *c.q.t.*, or his trust is fulfilled, the debtor may "revoke" the trusts, *i.e.* call for a reconveyance. After which the trustee is bare trustee for the debtor and, so far as creditors are concerned, the deed is at an end.

Who may revoke the deed.

Debtor's executor may "revoke" the trusts: *In re Sanders' T.* (47 L. J. Ch. 667). If two settlors, A. and B., resettle their property on themselves and others by family agreement, subject to trusts for A.'s creditors, A. alone may revoke these trusts: *Ex p. Wreford* ([1892] 1 Q. B. 872). Debtor's bankruptcy revokes the trusts (*ib.*).

Deeds which do not create revocable agencies convertible into irrevocable trusts.

Although family arrangements so far as creditors are concerned are within this rule, *Ex p. Wreford*, yet trusts for creditors to take effect from settlor's death are construed as irrevocable from the first, *In re Fitzgerald's S.* (37 Ch. D. 18); *Frewen* v. *Law Life Ass. Soc.* ([1896] 2 Ch. 511, 518–19); *Priestley* v. *Ellis* ([1897] 1 Ch. 489); but one reason given, that an executor cannot revoke them, is inconsistent with *In re Sanders' T.*; so that the better reason seems to be that bounty is presumed as the one and only intention of after-death settlements: *Synnot* v. *Simpson* (5 H. L. C. 121, 141)*. Trust deeds to repair breaches of trust are irrevocable because involuntary: per Lord Esher, M.R., *New's Trustee* v. *Hunting* ([1897] 2 Q. B. 19, 26). Trust deeds in which settlor parts with the residuary beneficial interest are irrevocable: *Godfrey* v. *Poole* (13 A. C. 497). Where partners assigned a business to trustees upon trust to carry it on and sell it, and divide the profits and proceeds rateably among their creditors according to their debts, and the proceeds exceed the debts, the C. A. applied the principle that gifts for a purpose which does not exhaust the gift, *In re Printers' Soc.* ([1899] 2 Ch. 184); *In re West* ([1900] 1 Ch. 84); *In re Abbott Fund T.* ([1900] 2 Ch. 326), or for a purpose which fails, *In re Tilt* (74 L. T. 163); *Phillips* v. *Probyn* ([1899] 1 Ch. 811), result to the giver, but the House of Lords held that the creditors took beneficially: *Smith* v. *Cooke* ([1891] A. C. 297). Compare *Wild* v. *Banning* (2 Eq. 577). Contrast *May* v. *May* (33 B. 81), *Green* v. *Wynn* (4 Ch. 204). Therefore creditors' trust deeds worded in this way will be irrevocable, as in *Godfrey* v. *Poole*.

Transactions and informal words do not create such trusts.

Liquidators, *Knowles* v. *Scott* ([1891] 1 Ch. 717), warrant officers for distribution of booty, *Kinloch* v. *Indian Sec.* (7 A. C. 619), are not, and Bankers acting as special agents (*post*, p. 200) have not been brought within the rule in *Johns* v. *James*: *Henderson* v. *Rothschild* (33 Ch. D. 459, 35 W. R. 485); *Malcolm* v. *Scott* (3 Ha. 39). The rule has never been applied except to express trusts created by deed.

Meaning of Communication.

If debtor represents something to creditor, which induces the latter to alter his position, debtor is equitably estopped from doing anything inconsistent with that representation. This doctrine is called the doctrine of communication when applied to these cases.

Effect of

Communication in this sense must clearly refer to the fund, communication.

Latouche v. *Lucan* (7 Cl. & F. 772, 792); *Cornthwaite* v. *Frith* (4 D. & S. 552); *Henderson* v. *Rothschild* (*supra*). If assignor's agent communicates the deed to a creditor, the creditor is in the absence of other evidence turned into *c.q.t.*: *Harland* v. *Binks* (15 Q. B. 713, 720–21). Although the deed excludes creditors who do not execute it within six months, creditors who have lain by on the faith of the deed may become *c.q.t.* without complying with this condition: *In re Baber's T.* (10 Eq. 554), *Cosser* v. *Radford* (1 D. J. & S. 585). A proviso enabling creditors to execute the deed at any time after its date is valid, but incumbrancers who have unsuccessfully claimed against the deed are not allowed afterwards to execute it and take its benefit: *In re Meredith* (29 Ch. D. 745), citing *Watson* v. *Knight* (19 B. 369).

Bankruptcy, etc., legislation.

A creditors' trust deed may, *Spencer* v. *Slater* (4 Q. B. D. 13), or may not, *Alton* v. *Harrison* (4 Ch. 622); *Green* v. *Brand* (1 Cab. & E. 410); *Boldero* v. *London Discount Co.* (5 Ex. D. 47); *Godfrey* v. *Poole* (13 A. E. 497), show an intention to defeat creditors and be therefore void under 13 Eliz. c. 5. Until 27 Eliz. c. 4 was superseded by 56 & 57 Vict. c. 21, these assignments while voluntary could be defeated by subsequent sales for value. Creditors' trust deeds which create preferences will be void as against a trustee in bankruptcy under sect. 48 of the *Bankruptcy Act*, 1883. Deeds to repair breaches of trust are not within this section, *Ex p. Dyer* ([1901] 1 K. B. 710); *Sharp* v. *Jackson* ([1899] A. C. 419); and the same rules apply in winding-up companies: *In re Stenotyper* ([1901] 1 Ch. 250). If *bonâ fide*, they are "an act of bankruptcy" (sect. 4 (1) (*a*)), and will justify a petition in bankruptcy if presented within three months (sect. 6 (1) (*c*)), *Ex p. Gundry* (83 L. T. 416); *In re Hughes* ([1893] 1 Q. B. 595); but see *Ex p. Barton* ([1900] 2 Q. B. 329) (trades debts); contrast p. 56 (3). If and so long as they are voluntary they are void in bankruptcy under the Act of 1883, s. 47; see p. 58. "Deeds of arrangement" (which term includes creditors' trust deeds) dated after January 1st, 1888, are void unless registered within a week after the first execution thereof (50 & 51 Vict. c. 57; amended 53 & 54 Vict. c. 24). This law does not apply to a foreigner's deed executed abroad and valid there although the chattels passed by it are in England: *Dulaney* v. *Merry* ([1901] 1 K. B. 536).

Relief to Debtors, or Penalties and Forfeiture.

WALLIS *v.* SMITH.

(21 Ch. D. 243.)

Principle.

The Court in deciding whether a sum of money payable on breach of a condition is to be treated as a penalty or as liquidated damages, proceeds on the principle that the primary object is to ascertain the intention of the parties, but in ascertaining the intention the Court will have regard to the principles established by decided cases.

Summary of facts.

Wallis contracted to sell an estate to Smith for £70,000, which was to be expended by Smith in building on the estate. £5000 was to be deposited in their joint names in part payment of the £70,000, and after being so deposited was to be similarly expended by Smith. Part of the deposit (£500) was to be paid on the execution of the contract. Clause 25 of the agreement provided that if Smith should commit any substantial breach of the contract in not diligently carrying out the works, or in not performing any of its provisions, the deposit of £5000 or a sum of £5000 should be forfeited "as liquidated damages."

Smith neither paid the £500 nor performed any part of the contract. Held, by the C. A., that Wallis was entitled to £5000 as liquidated damages.

Equity and Contract.

The Courts as a rule maintain contracts, and this has been the principle of equity at any rate since Lord Eldon's time. "He" (Lord Eldon) "perfectly well knew that whatever had been the doctrine of equity at one time, it was not then the doctrine of equity to give relief on the ground that agreements were oppressive where the parties were of full age and at arm's length" (per Jessel, M.R., in the l.c., p. 260). "I have always thought," said Jessel, M.R., "and still think, that it is of the utmost importance as regards contracts between adults—persons not under disability, and at arm's length—that the Courts of law should maintain the performance of the contracts according to the intention of the parties; that they should not overrule any clearly-expressed intention on the ground that judges know the business of the people better than the people know it themselves. I am perfectly well aware that there are exceptions, but they are exceptions of a legislative character" (p. 266). (For instances of the latter, see 4 & 5 Anne c. 16, ss. 12, 13) (penal bonds); (63 & 64 Vict. c. 50, s. 6) (penal rents), (and *note.*)

Origin of rule.

What, then, is the origin of the exception to this rule, that when parties to an agreement say "liquidated damage" they are often taken to mean "penalty," *i.e.* compensation for actual loss sustained? Common law judges have always described it as "equitable relief against forfeiture," but Jessel, M.R., showed that since Lord Eldon's time equity has disclaimed responsibility for it. Each fathered it on the other. Perhaps the true explanation is that it is part of law merchant subsumed into equity and statute law, and only tardily and imperfectly assimilated by common law. Certainly this is the true explanation with regard to penal bonds: the (double) penalty in which was merely meant as a substitute for interest when interest was illegal. And the traces of this origin may be discerned in two doctrines which still prevail: first the sum mentioned as penalty gives the maximum recoverable at any one time for capital and interest on a penal bond: *Hatton* v. *Harris* ([1892] A. C. 547); contrast *Mathews* v. *Keble* (3 Ch. 691, 699); *Knipe* v. *Blair* ([1900] 1 Ir. R. 372); secondly, equity has always awarded interest on penal and only on penal bonds which do not stipulate for interest, but not by way of damages for breach of contract: *In re Dixon* ([1900] 2 Ch. 561, 576).

Seven rules.

Jessel, M.R., laid down four rules as the result of the cases. It will, however, be advisable to preface his four rules with three rules applicable to a contract to pay a penal sum for breach of a single condition, and the seven rules may be stated thus:—

I. Single agreement to pay a larger on non-payment of a smaller sum.

I. Where a man agrees to pay a larger amount if he does not pay a smaller amount, the larger amount is only named by way of penalty.

(1) A. B. agrees by bond to pay £1000 by way of liquidated damages if he does not pay £500 and interest a year hence. The £1000 is penalty (4 & 5 Anne, c. 16, ss. 12, 13). See *Hatton* v. *Harris* ([1892] A. C. 547).

(2) A. B. agrees in a mortgage deed to pay 4 per cent. interest, and if unpunctual to pay 5 per cent. Five per cent. is penalty: per Lord Hatherley (5 A. C. 702). See, too, *Thornhill* v. *Evans* (2 Atk. 330).

(3) *Secus*, if A. B. agrees to pay 5 per cent. reducible to 4 per cent. interest; *ib.* and *secus*, if he agrees to pay the additional percentage

by way of commission, *General Credit and Discount Co.* v. *Glegg* (22 Ch. D. 549), or fine, *Parker* v. *Butcher* (3 Eq. 762).

(4) Where A. B. agrees by mortgage bond to pay the whole mortgage debt as soon as any instalment is overdue, the whole sum is due as liquidated damage when the condition occurs: *Wallingford* v. *Mutual Society* (5 A. C. 685); *Protector Loan Co.* v. *Grice* (5 Q. B. D. 592).

(5) A. B. agrees by way of mortgage to pay (*a*) £1000 reducible to £700 on punctual payment: *Ford* v. *Chesterfield* (19 B. 428); *Thompson* v. *Hudson* (L. R. 4 H. L. 1). (*b*) £700 plus £300 commission for services rendered: *The Benwell Tower* (72 L. T. 664). (*c*) £1000, £700 only having been received, £300 being a commission: *Potter* v. *Edwards* (5 W. R. 407); *Mainland* v. *Upjohn* (41 Ch. D. 126). £1000 is liquidated damage.

(6) *Secus*, if the mortgage is for £700, redeemable on payment of £700 *plus* £300 sham commission: *Broad* v. *Selfe* (11 W. R. 1036); *Scott* v. *Brest* (2 T. R. 238); *James* v. *Kerr* (40 Ch. D. 459).

(7) Debentures issued at a discount are valid for their face value: *In re Anglo-Danubian Co.* (20 Eq. 339); *In re Regent's Canal Co.* (3 Ch. D. 43).

(8) A. B. agrees to an award whereby he has to pay £1200 annuity to C. D., and if not secured an extra £100 per month until secured, such extra £100 to be by way of penalty and additional to the annuity. The extra £100 is liquidated damage: *Ex p. D'Alteyrac* (15 Eq. 36).

(9) So, too, a contract to pay 4 per cent. on purchase-money until 1858, thenceforward 5 per cent. (if it is unpaid) until 1859, thenceforward, etc.: *Herbert* v. *Salisbury, &c., Ry. Co.* (2 Eq. 221).

The principle of these cases is that where there is on the face of a document no consideration for more than a given sum, the agreement is void in so far as it exceeds the sum named; it can only be valid if construed as a penalty.

II. Or on non-performance of a trivial condition.

II. If a man agrees to pay a large amount by way of liquidated damage for a breach of covenant which is trivial, the large amount is penalty, as it was in the following cases:—

(10) A. B. agrees that his agent will sign a bill of lading when presented, or else he will pay 4*d.* per ton per day as liquidated damages until signature: *Jones* v. *Hough* (5 Exch. D. 115); *Rayner* v. *The Rederiaktiebolaget Condor* ([1895] 2 Q. B. 289); *The Princess* (70 L. T. 388).

III. Or on non-performance of any other condition.

III. In any case other than those coming under the first or second class a contract to pay a penal sum for breach of a single condition is presumed to mean liquidated damages, as in these cases:—

(11) A railway company agrees to pay a penalty of £100 per acre and interest if certain slag-hills are not levelled and soiled on such and such a day: *Elphinstone* v. *Monkland Iron, etc., Co.* (11 A. C. 332).

(12) A contractor agrees to pay £100 if certain works are not

complete on such and such a day, and £5 per week until completion: *Law* v. *Redditch Local Board* ([1892] 1 Q. B. 127).

(13) A public-house keeper agreed to pay his lessor £50 if convicted of contravening the *Licensing Act*: *Ward* v. *Monaghan* ([1895] W. N. 123).

Difficulties occur in applying these rules to cases where there is an agreement with many terms and the penalty (or liquidated damage) is for breach of any one term. These cases, according to Jessel, M.R., in the l.c., are regulated by four rules (which we shall number IV. to VII.).

IV. Agreement with many terms, one of which is as in I.

IV. Where any one term is the payment of a sum less in amount than the penal sum, the penal sum is penalty. In the five following cases A. B. contracted to pay the sum if any breach of any term occurred, and the sum was penalty only.

(14) A. B. agrees to pay £1000 as liquidated damages in case of breach, and one term is to pay £10 per week in a certain event: *Ex parte Capper* (4 Ch. D. 724).

(15) A. B. agrees to pay £1000 as liquidated damages in case of breach of a theatrical agreement, and one term is to pay £3 6*s*. 8*d*. a day: *Kemble* v. *Farren* (6 Bing. 141); *Astley* v. *Weldon* (2 B. & P. 346).

(16) Purchaser, P., agrees that all payments made to vendor (V.) should be forfeited as liquidated damages in case of breach, and one term is to pay the purchase-money by three instalments of £4200. Payments made included £1400 (which the Court held to be part payment of the purchase-money, but not deposit) and £450 for machines not yet supplied. The £1850 is penalty for any breach of any term. On any other construction if P. had paid two instalments and failed to pay the third, he would have forfeited at least £8400 for not paying £4200: *Barton* v. *Capewell, etc., Co.* (68 L. T. 857).

(17) "If the contract had contained an express stipulation that on the non-payment of any instalment," or non-completion of the works, "the purchaser should forfeit all the instalments which he had previously paid, I think the Court would have regarded that provision as a penalty, and would have relieved him from it, as was done in *In re Dagenham & Co.* (8 Ch. 1022);" ([1900] 2 Ch. 304).

(18) Although it did not contain such a clause, and although P. could not insist on specific performance, or claim a lien, yet the Court awarded him damages to the amount of his instalments owing to V. not having given proper notices: *Cornwall* v. *Henson* ([1900] 2 Ch. 298). This principle was distinguished from that in *Howe* v. *Smith* (22), and compared to that in *Mersey Steel Co.* v. *Naylor* (9 A. C. 434).

And note on the point of construction: In the l.c. the payment of £500 was not regarded as within the "substantial breaches" referred to in clause 25; and in *Catton* v. *Bennett* (*infra*) a proviso, "should the purchaser refuse to carry out the above arrangement" he should forfeit £500, was not construed as meaning "any of the terms of the above arrangement," but "the above arrangement as a whole;" so that the case came within *Elphinstone* v. *Monkland Iron Co.* (*ubi supra*), and *Lea* v. *Whitaker* (*infra*).

V. Or as in II.

V. Where any one term is or must be of trivial value, having regard to the penal sum, it would follow, from the analogy of Rule II., that the penal sum should be construed as penalty. In *Wallis* v. *Smith* this rule was treated as resting merely on inconclusive *dicta*. In addition to the *dicta* criticized by the M.R., the following may be mentioned:—

Lord Westbury, L.C., said, in *Thompson* v. *Hudson* (L. R. 4 H. L. 1, 30), thus: "It was an oppressive agreement, the sum named never could have been the proper amount of damages arising upon the non-observance of some of the stipulations of that agreement, which probably would have been measured by a few shillings." But the case to which he referred (*Kemble* v. *Farren*) comes under the fourth head, and the allusions to "oppression" are not consistent with the principle that equity maintains contracts (see above). Compare *Elphinstone* v *Monkland Iron Co.* (11 App. Cas. 332, 342).

(19) A penal rent was payable "as penalty" on breach of either of two conditions of obviously very unequal value. This was construed as penalty: *Willson* v. *Love* ([1896], 1 Q. B. 626)*. Such penal rents are now so construed by Statute 63 & 64 Vict. c. 50, s. 6.

VI. Or as in III.

VI. Subject to IV. and V., the sum named as liquidated damage will be construed literally as such. In bringing the l.c.* under this head, Jessel, M.R., expressed his disagreement with certain *dicta*, which suggested that where terms varied in importance the penal sum was mere penalty. These *dicta* have, however, been approved by *Willson* v. *Love* (*supra*).

VII. Special rule as to forfeiture of deposits.

VII. Where a deposit is to be forfeited for the "breach of a number of stipulations, some of which may be trifling, some of which may be for the payment of money on a given day," the contract is literally enforced.

(20) A sum paid as a deposit and as part payment of purchase-money is forfeited, whether or not there is a clause providing for forfeiture in case the purchaser makes default: *Ex p. Barrell* (10 Ch. 512). Compare *Catton* v. *Bennett* (51 L. T. 70); *Lea* v. *Whitaker* (L. R. 8 C. P. 70).

(21) In *Thomas* v. *Brown* (1 Q. B. D. 714) V. and P. uniformly corresponded "without prejudice to any question which may arise as to the contract of purchase." But P. had paid his deposit, and could not therefore recover it when he repudiated the contract.

(22) In *Howe* v. *Smith* (27 Ch. D. 89), on a sale of real estate for £12,500, P. paid £500 as deposit, and agreed that if he did not pay the balance on a day named, V. might resell and recover any deficiency in price as liquidated damages. P. did not pay the balance, *i.e.* £12,000, and V., who re-sold the property for £12,500, was allowed to retain the deposit. Cotton, L.J., said, "In order to enable the vendor to retain

the deposit there must be acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract."

(23) In *Soper* v. *Arnold* (14 App. Cas. 429) P. paid a deposit, accepted the title, then made default. Three years afterwards P. sued for the recovery of his deposit on the ground that V. had no title (which was proved) and could not have completed if P. had not made default. It was held that P. could not go back upon his acceptance of V.'s title and could not recover his deposit. Compare *Rosenberg* v. *Cook* (8 Q. B. D. 162); *In re Nat. Prov. B. of E. and Marsh* ([1895] 1 Ch. 190).

(24) In *In re Scott and Alvarez's C.* ([1895] 2 Ch. 603) a vital defect of title was discovered, to which P. had precluded himself by his conditions from objecting. The Court refused the return of the deposit, but also refused specific performance. See *post*, p. 93.

(25) Where V. and P. are both to blame, but P. only because he sued too late for specific performance, and therefore fails through lâches, P. is allowed a lien on the subject-matter of the contract for his deposit and interest: *Levy* v. *Stogdon* ([1898] 1 Ch. 478, [1899] 1 Ch. 5), following *Rose* v. *Watson* (10 H. L. C. 672)*.

(26) *Ditto* if V. and P. are both blameless: *Whitbread* v. *Watt* ([1901], 1 Ch. 911). As to interest, see *post*, p. 333.

NOTE.—*Relief to Lessees.*

Relief against forfeiture or non-payment of rent,

From a very early period equity has given relief to a lessee ejected for non-payment of rent, on his paying rent, interest, and costs. The *C. L. P. Act*, 1852 (ss. 211, 212) (superseding 4 Geo. II. c. 28, s. 3, which was repealed by the *S. L. R. Act* (30 & 31 Vict. c. 59)), limits such relief to a period of six months after execution. When this period has elapsed this right is "foreclosed."

The *C. L. P. Act*, 1860, s. 1, extends this power to the Courts of Common Law. These enactments are preserved by the *C. Act*, 1881, s. 14, sub-s. 8: *Howard* v. *Fanshawe* ([1895] 2 Ch. 581)†.

and on breach of other conditions.

The 14th section of the *C. Act*, 1881, which is retrospective and compulsory, enacts by sub-s. 1 that a right of re-entry or forfeiture for breach of covenant or condition in a lease shall not be enforceable until the lessor serves on the lessee a notice specifying the breach, and if the breach is capable of remedy, requiring the lessee to remedy it, and in any case requiring the lessee to make compensation, and the lessee fails within reasonable time to comply. See generally *North London Land Co.* v. *Jacques* (32 W. R. 283); *Lock* v. *Pearce* ([1893) 2 Ch. 271); *Ex p. Lovell* ([1901] 2 K. B. 16). The notice must particularize the breaches complained of: *Fletcher* v. *Nokes* ([1897] 1 Ch. 271); *In re Serle* ([1898] 1 Ch. 652); *Horsey E.* v. *Steiger* ([1899] 2 Q. B. 79); *Jacob* v. *Down* ([1900] 2 Ch. 156); but see *Pannell* v. *London, &c., Co.* ([1900] 1 Ch. 496). One notice is enough for a continuing breach: *Penton* v. *Barnett* ([1898] 1 Q. B. 276). Compensation includes lessor's cost and expenses: *C. Act*, 1892, 2 (1); *Nind* v. *Nineteenth Century B. Soc.* ([1894] 2 Q. B. 226).

Sub-sect. 2 provides that where a lessor is proceeding to enforce such right of entry or forfeiture, the lessee may in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief, which the Court may grant or refuse as it thinks fit, but not after re-entry: *Rogers* v. *Rice* ([1892] 2 Ch. 170). In granting relief it may raise rent: *Ewart* v. *Fryer* ([1901] 1 Ch. 499).

By sub-sect. 6 the section is not to extend:—

Exceptions.

(1) To a covenant or condition against assigning or under-letting, or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest; or,

(2) In case of a mining lease to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines, or other things, or to enter or inspect the mine or the workings thereof. As to "assignment," see *Gentle* v. *Faulkner* ([1900] 2 Q. B. 267); *Horsey E.* v. *Steiger* (*supra*); *Ex p. Lovell* ([1901] 2 K. B. 16). No relief is granted against neglect to get consent: *Barrow* v. *Isaac* ([1891] 1 Q. B. 417); *Eastern Telegraph Co.* v. *Dent* ([1899] 1 Q. B. 835); or in investigating title: *Imray* v. *Oakshette* ([1897] 2 Q. B. 218).

Bankruptcy, etc.

By sect. 2 (2) of the *C. Act*, 1892, a bankrupt lessee or a lessee whose interest has been taken in execution will be relieved against a condition for forfeiture therefor, during one year from the date of the bankruptcy or taking in execution, unless in the mean time the lessee's interest has been sold, but this sub-section is not to apply, *e.g.*, to agricultural or pastoral land, mines or minerals, furnished houses and public-houses. See *Smith* v. *Gronow* ([1891] 2 Q. B. 394); *Bryant* v. *Hancock* ([1898] 1 Q. B. 716; [1899] A. C. 442); *Mumford* v. *Walker* (xviii. T. L. R. 80) as to lessee's assign. As to "bankruptcy," see *Horsey E.* v. *Steiger*; *Ex p. Lovell*; *Ewart* v. *Fryer* (*supra*).

"Lessee."

By s. 14, sub-sect. (3) of the Act of 1881 lessee includes underlessee: *Burt* v. *Gray* ([1891] 2 Q. B. 98). By sect. 5 of the Act of 1892, "lease" and "underlease" in both Acts include an agreement for a lease or underlease; and by sect. 4 the Court may vest a lease or part thereof in an underlessee of the whole or part of the property: *Cholmeley's School* v. *Sewell* ([1893] 2 Q. B. 254); *Imray* v. *Oakshette*, *supra*.

See Woodfall's Landlord and Tenant, 16th ed. pp. 346 *et seq.*

Relief to "Expectant Heirs," and other Similar Cases.

EARL OF AYLESFORD *v.* MORRIS.

(L. R. 8 Ch. 484.)

Principle.

The Court will relieve "expectant heirs" against bad bargains relating to their reversionary or expectant interests if they have had no independent advice; and if some deceit has been practised or age or poverty has enfeebled their intelligence.

Summary of facts.

The Earl of Aylesford, who was entitled to large estates as tenant in tail expectant on the death of his sick father, had contracted debts during his minority, and shortly after attaining his majority borrowed from Morris, a money-lender, £6800 on his acceptance at three months for £8000, and a policy effected at his own cost. The money was borrowed partly in order to pay off an old debt, and Lord Aylesford had no independent advice. When the acceptance became due an arrangement was entered into under which Lord Aylesford received £207 and gave acceptances for £11,000. The C. A. ordered all securities to be given up upon payment of the sums actually advanced, with interest at five per cent. per annum.

Effect of the *Sale of Reversions Act.*

The *Sale of Reversions Act* (31 Vict. c. 4) provides that "No purchase made *bonâ fide* and without fraud or unfair dealing of any reversionary interest in real or personal estate shall hereafter be opened or set aside merely on the ground of undervalue;" and "purchase" includes all contracts and conveyances passing any beneficial interest, *e.g.* mortgages. This Act was passed in order to restrain equity from setting aside sales and mortgages by portly colonels, *Portmore* v. *Taylor* (4 Si. 182), wise attorneys, *Wiseman* v. *Beake* (2 Vern. 121), and other elderly Esaus, *Jones* v. *Ricketts* (31

B. 130), *Bromley* v. *Smith* (26 B. 644, 661, 662), on the exclusive ground that they had made a bad bargain. There is no reported case extending this peculiar doctrine to sales or mortgages in equity of an expectancy or *spes successionis;* and it may be doubted whether loans or purchases of goods on the security of bonds, and the like, can be set aside on the mere ground of undervalue: *Barny* v. *Beak* (2 Ch. Cas. 136); *Benyon* v. *Fitch* (35 B. 570); *Tottenham* v. *Green* (32 L. J. Ch. 201). It is submitted therefore that at the present day a single principle prevails with regard to all dealings by reversioners, heirs apparent, and the like, whether those dealings are sales, mortgages, or loans (including purchases of goods on credit).

Ground of equitable interference

As a rule equity does not interfere with contracts (see *Wallis* v. *Smith*); but it is otherwise where disability, undue influence, or fraud exists.

This equity dates from Jeffreys, L.C.; and its object—the protection of hereditary capitalism—has been stated boldly by its author and by some of his successors, *Berney* v. *Pitt* (2 Vern. 14); *Nott* v. *Johnson* (2 Vern. 27); *Portmore* v. *Taylor* (4 Si. 213), as Lord Selborne darkly hints below. Lord Thurlow and Sir W. Grant justified it by a theory which attributed constructive infancy to those who have great expectations, *Gwynne* v. *Heaton* (1 Br. 9); *Peacock* v. *Evans* (16 V. 514); *Tottenham* v. *Green*, at p. 205; but Lord Selborne, in the l.c. (p. 489), describes the modern rule in terms which indicate that it is a species of constructive fraud. "There is," he says, "hardly any older head of equity than that described by Lord Hardwicke in *Earl of Chesterfield* v. *Janssen* (W. & T. L. C. i., 289)* as relieving against the fraud 'which infects catching bargains with heirs, reversioners, or expectants, in the life of the father,' etc. 'These' (he said) 'have been generally mixed cases,' and he proceeded to note two characteristics always found in them. 'There is always fraud presumed or inferred from the circumstances or conditions of the parties contracting—weakness on one side, usury on the other, or extortion, or advantage taken of that weakness. There has been always an appearance of fraud from the nature of the bargain.' Fraud," he adds, "does not mean here deceit of circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions, and when the relative position of the parties is such as *primâ facie* to raise the presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence proving it to have been in point of fact just and reasonable." The *onus probandi* that there was an enforceable and fair contract lies on the acreditor.

is presumptive fraud.

Secrecy is a usual but not necessary ingredient

Lord Selborne then proceeded to show that in these cases concealment was almost universally present; indeed, this feature was considered by Lord Brougham, in *King* v. *Hamlet* (2 My. & K. 456), to be an indispensable condition of equitable relief, though Lord Selborne, like Lord St. Leonards (Sug. V. & P., 11th ed., p. 316) dissented from that opinion. "The victim comes to the snare (for this system of dealing does set snares, not, perhaps, for one prodigal more than another, but for prodigals generally as a class), excluded, and known to be excluded, by the very motives and circumstances which attract him, from the help and advice of his natural guardians and protectors, and from that professional aid which would be accessible to him, if he did not feel compelled to secrecy. He comes in the dark, and in fetters, without either the will or the power to take care of himself, and with nobody else to take care of him. Great judges have said that there is a principle of public policy in restraining this; that this system of undermining and blasting, as it were, in the bud the fortunes of families is a public as well as a private mischief; that it is a sort of indirect fraud upon the heads of families from whom these transactions are concealed, and who may be thereby induced to dispose of their means for the profit and advantage of strangers and usurers, when they suppose themselves to be fulfilling the moral obligation of providing for their own descendants. Whatever weight there may be in any such collateral considerations, they could hardly prevail, if they did not connect themselves with an equity more strictly and directly personal to the plaintiff in each particular case. But the real truth is that the ordinary effect of all the circumstances by which these considerations are introduced, is to deliver over the prodigal helpless into the hands of those interested in taking advantage of his weakness; and we so arrive in every such case at the substance of the conditions which throw the burden of justifying the righteousness of the bargain upon the party who claims the benefit of it."

"Expectant heir" has an extended meaning.

In *Beynon* v. *Cook* (10 Ch. 391 n.), Jessel, M.R., commented on the extensive meaning which the Courts have conferred upon the term "expectant heir" as follows:—"The phrase is used not in its literal meaning, but as including every one who has either a vested remainder, or a contingent remainder in a family property, including a remainder in a portion, as well as a remainder in an estate, and every one who has the hope of succession to the property of an ancestor, either by reason of his being the heir-apparent or presumptive, or by reason merely of the expectation of a devise or bequest on account of the supposed or presumed affection of his ancestor or relative." And further, "In order to be relieved he must have been trusted upon the credit of his expectations." This last sentence was illustrated in *Nevill* v. *Snelling* (15 Ch. D. 679), where the "heir apparent" had property neither in possession nor in reversion; but the moneylender lent him money because he was the son of a rich peer, and in the hope of dunning his relations. These cases now come under the Moneylenders Act, 1900 (note 2). An assignment made by persons or a person entitled both in possession and in remainder, *Wood* v. *Abrey* (3 Mad. 417); *Webster* v. *Cook* (2 Ch. 542); *Cooke* v. *Burtchaell* (2 Dr. & W. 176); *Wardle* v. *Carter* (7 Si. 490), is not a reversionary assignment; but see *Nesbitt* v. *Berridge* (32 B. 282) and dictum in *Tyler* v. *Yates* (11 Eq. 276).

Mesne transactions.

Bonâ fide mesne assignments for value are protected, *Judd* v. *Green* (33 L. T. 597), unless with knowledge of the circumstances:

Addis v. *Campbell* (4 B. 401); *Nesbitt* v. *Berridge* (32 B. 282) (1863). But the holder of a post-obit bond takes it with notice that it is voidable: *Tottenham* v. *Green* (32 L. J. Ch. 201) (1863).

Lâches and Ratification.

The reversioner's ratification is of no use until his estate falls into possession; or if there is some other element of unfairness, until this element is removed; *King* v. *Hamlet* (2 My. & K. 480); *Fry* v. *Lane* (40 Ch. D. 312, 324). Forty, *Whalley* v. *W.* (3 Bl. 17), or twelve years' acquiescence has, *Moth* v. *Atwood* (5 V. 845), forty, *Salter* v. *Bradshaw* (26 B. 161), or thirty-four years' acquiescence, *Roche* v. *O'Brien* (1 Ba. & B. 330), *plus* confirmation (*ib.*), has not barred relief. A person does not lose his right to rescind a contract "by acting upon it or by delay in impeaching it so long as he remains in ignorance of his right:" per Romer, J., *Rees* v. *De Barnardy* ([1896] 2 Ch. 445); see *Tyler* v. *Yates*, *post* (8). See *post*, pp. 84, 85.

Illustrations

We append the following illustrations as to undervalue, age, and other circumstances indicative of unfairness. The heir-apparent had no independent advice.

as to undervalue (order).

(1) A., aged twenty-six, mortgages to L. a £600 post-obit bond taken in lieu of a reversion expectant on E.'s death for £85. It was to be redeemable six months later for £100, thereafter for £100 *plus* 60 per cent. int. Twelve years later E. dies. (L. only gets £85 and 5 per cent. interest): *Beynon* v. *Cook* (10 Ch. 389). Compare *Miller* v. *Cook* (10 Eq. 641). See (18).

(2) A., aged forty-seven, but being in possession, makes a similar contract, and is not relieved: *Webster* v. *Cook* (2 Ch. 542). It would seem from these two cases and from dicta in (11) *infra* that the law of 1868 has been made a dead letter by the C. A., unless there were elements of unfairness in (1) which were not reported. In any cases where such elements are proved an unfair price is regarded as an additional unfairness.

(3) Fair price means market price: *Davis* v. *Duke of Marlboro'* (2 Sw. 108, 143)* (Eldon, L.C.); *Aldborough* v. *Trye* (7 Cl. & F. 436, 458) (Cottenham, L.C.)*; *Talbot* v. *Staniforth* (1 J. & H. 484, 503); *Tynte* v. *Hodge* (13 W. R. 172); *Bromley* v. *Smith* (26 B. 644); *Wardle* v. *Carter* (7 Si. 490). But see *Perfect* v. *Lane* (3 D. F. & J. 369), and (10).

(4) A sale by auction is therefore upheld, *Shelley* v. *Nash* (3 Mad. 232); *Newton* v. *Hunt* (5 Si. 511), unless the conditions are depreciatory: *Fox* v. *Wright* (6 Mad. 111).

(5) L.'s valuer must know the place or parties valued: *Edwards* v. *Burt* (2 D. M. & G. 55), and (11). See *post*, pp. 173, 174.

(6) L. must keep his valuation: *Salter* v. *Bradshaw* (26 B. 161).

(7) Relief for inadequacy of consideration has often been refused before the Act: *Batty* v. *Lloyd* (1 Vern. 141); *Gardiner* v. *Cooper* (18 L. T. 627); *Woodroffe* v. *Allen* (Ha. & J. 73); *Nichols* v. *Gould* (2 Ves. 422) ("no fraud or imposition"); *Moth* v. *Atwood* (5 V. 845) ("done deliberately").

Youth.

(8) A.'s debts, or some of them, were contracted during infancy.

"All the subsequent transactions were affected by the vice which lay at the root:" *Tyler* v. *Yates* (6 Ch. 665); *Nevill* v. *Snelling* (*supra*); *Smith* v. *Kay* (7 H. L. C. 750); *Brooke* v. *Gally* (2 Atk. 34). *Qu.:* Was there ratification?

(9) A. is a prodigal son who has just emerged from infancy, *Croft* v. *Graham* (2 D. J. & S. 155), etc., and every case since 1868 except (1) and (11).

Other cases of deceit.

(10) The undervalue was due to E. having omitted to tell the valuer or L. that he had all but drunk himself to death. Lord Blackburn said that if the purchaser had known this, "or was only ignorant because he had neglected to make proper inquiries, or had neglected to take some steps which according to the rules of equity he ought to have taken," the sale would have been voidable. As it was the sale was upheld owing to the father having acted as independent adviser to A.: *O'Rorke* v. *Bolingbroke* (2 A. C. 814). As to what is independent advice, compare *Miller* v. *Cook* (10 Eq. 641), and *post*, pp. 78, 112.

(11) A. was thirty; L. found that the value of the reversion was £600, and advanced £300. Redemption price was £600. He dictated to A. a letter to his solicitor asking what he was entitled to, but giving a false reason: *Brenchley* v. *Higgins* (83 L. T. 751). Compare (12).

Mixed cases.

The following are mixed cases where actual fraud or undue influence or duress co-existed with constructive fraud. As to the connection of secrecy and actual fraud, see *Gordon* v. *Street* ([1899] 2 Q. B. 641).

Fraud.

(12) The deed stated £500 as the consideration; only £250 was paid. The recitals were "palavering, insincere, dishonest:" *In re Slater's T.* (11 Ch. D. 227); *Wyatt* v. *Cook* (18 L. T. 12).

(Interest.)

(In *In re Slater's T.* only six years' interest was allowed; the Statute of Limitations being applied by analogy.)

Illiteracy, misrepresentation, surprise.

(13) Misrepresentation and conspiracy to defraud existed in *Waller* v. *Dalt* (1 Dick. 8); *Wharton* v. *May* (5 V. 26, 59).

(14) A. is an ignorant middle-aged day labourer: *Fry* v. *Lane* (40 Ch. D. 312). Kay, J., said: "The result of the decisions is, that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set aside the transaction. This will be done even in the case of property in possession and *à fortiori* if the interest be reversionary."

(15), (16), and (17) are cases where A. was in possession.

(15) A. is a dirty old "marksman," who called himself Jack the Giant-killer, but his neighbours called him Old Breeches. Here relief was granted although the property was in possession: *Longmate* v. *Ledger* (2 Giff. 157); *Clark* v. *Malpas* (4 D. F. & J. 401); *Baker* v. *Monk* (4 D. J. & S. 388) (old spinster); *Wood* v. *Abrey* (3 Mad. 417). Contrast *Harrison* v. *Guest* (6 D. M. & G. 424, 8 H. L. C. 481), where independent advice was suggested and refused, and the sale was upheld.

(16) L. is next-of-kin agent; A., the heir in possession of he knows

not what, or is illiterate and over seventy; L. only tells half what he knows: *Rees* v. *de Barnardy* ([1896] 2 Ch. 437). Was there not a duty to disclose (*post*, p. 78), which made this case one of misrepresentation (*ib.* p. 444), like *Haygarth* v. *Wearing* (12 Eq. 320)? or was it not a case of ignorance and surprise like *Evans* v. *Llewellyn* (1 Cox, 333)? See, too, *James* v. *Kerr* (40 Ch. D. 449, 460), which, like *Rees* v. *de Barnardy*, was also a champerty case.

(17) A half-seas-over Jack ashore, aged twenty-one, sells his inheritance for an old song: *Stilwell* v. *Wilkins* (Jac. 280).

Duress.

(18) Duress: *Talbot* v. *Staniforth* (1 J. & H. 484, 503); *Evans* v. *Cheshire* (Belt, 300); in *Miller* v. *Cook* (10 Eq. 641) there was fear of arrest.

Sale to trustee.

(19) Sale to trustee by *c.q.t.*: *Edwards* v. *Browne* (2 Coll. C. C. 100).

Constructive undue influence.

(20) Solicitor and client cases:—*In re Unsworth* (12 L. T. N. S. 49); *Roche* v. *O'Brien* (1 Ba. & B. 330); *Twistleton* v. *Griffith* (1 P. W. 310); *King* v. *Savery* (1 Sm. & G. 271); *James* v. *Kerr*, *supra*; *Cane* v. *Allen* (2 Dow. 289); *Montesquieu* v. *Sandys* (18 Ves. 301).

(21) Presumptive undue influence was exercised by brother over sister, *Sharp* v. *Leach* (31 B. 491); by father-in-law, *Bernal* v. *Donegal* (3 Dow. 133); by brother-in-law over drunkard, *Davies* v. *Cooper* (5 M. & C. 270); by father, *Heron* v. *H.* (2 Atk. 160); by friend, *Bawtree* v. *Watson* (3 M. & K. 339); *Smith* v. *Kay* (7 H. L. C. 750, 771); *Wharton* v. *May* (5 Ves. 26). All these cases except (1) and (11), and except certain cases of heirs apparent before 1868, may also be grouped under one principle—the unreality of A.'s consent vitiated the contract.

Practice.

For order where there are securities, see *Tyler* v. *Yates* (11 Eq. 265, 278) (6 Ch. 665); and see Seton, 5th ed. pp. 1947–9.

Costs.

In cases of this description, where relief is sought against a bargain alleged to be unconscionable, the usual course is not to give the plaintiff his costs, the Court proceeding on the principle that he ought to pay for the relief which is granted to him against the consequences of his own folly. If, however, the defendant has refused reasonable terms offered before the commencement of the action, as in *Nevill* v. *Snelling*, *Beynon* v. *Cook*, etc., or has been guilty of fraud or misconduct, the plaintiff may be allowed costs.

In *Fry* v. *Lane* (40 Ch. D. 324), Kay, J., said:—"I am glad that no absolute rule has been laid down by the Court in these cases. Sometimes where the only ground was undervalue, the plaintiff has been relieved on payment of costs, as in *Twistleton* v. *Griffith*. In some cases no costs are given, as in *Bromley* v. *Smith*; sometimes the costs are thrown upon the defendant, as in *Nevill* v. *Snelling*."

NOTE I.—*Infant's Relief Act.*

Infant's Relief Act, 1874, s. 1.

The *Infant's Relief Act*, 1874, should be pleaded: *Nevill* v. *Snelling* (15 Ch. D. 705):—

Sect. 1 provides that "all contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent or for goods supplied or to be supplied (other than contracts for necessaries) and all accounts stated with infants shall be absolutely void." This is followed by a proviso that this enactment shall not invalidate any contract into which an infant may by any existing or future statute or by the rules of common law or equity enter except such as now by law are voidable.

Sect. 2.

Sect. 2 provides that "no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

See *Thurstan* v. *Nottingham P. B. B. Soc.* ([1901] W. N. 235); *post*, p. 309 *et seq.*: Pollock on Contract, 6th ed. pp. 59–63.

Note II.—*Moneylenders Act.*

The *Moneylenders Act*, 1900, provides that where moneylenders proceed against borrowers for money lent since the 1st Nov., 1900, and the interest or costs are excessive and the "transaction is such that a Court of Equity would give relief" on the ground of its being harsh and unconscionable within the meaning of this or the next chapter, the Court may make any order it thinks just as to principal and costs, and reopen settled accounts and set aside or alter securities. [This is the effect of *Wilton* v. *Osborn* ([1901] 2 K. B. 110).] Assigns without notice are protected.

Relief to Client against Solicitor, or Unfair Advantage.

McPHERSON *v.* WATT.

(3 App. Cas. 254.)

Principle.

An English solicitor (like a "Scotch writer" and "advocate of Aberdeen") stands in a confidential relation to his client, and any purchase from his client, in which the fact that he is purchasing for himself is concealed, will be set aside.

Summary of facts.

Two ladies, who were trustees and acted in the trust principally through their brother, Hugh McPherson, were desirous of selling four houses. John Watt, "an Aberdeen advocate," who was employed as law agent by each of the vendors in collateral matters, advised McPherson to sell by private treaty, and was commissioned to obtain a purchaser. He had named £1900 as a fair price, and said that his brother, Dr. Watt, would probably buy at that price. The property was then sold to Dr. Watt for £1900. The trustees believed that Dr. Watt was the sole purchaser, but there had been a previous arrangement between the brothers that John Watt should have two of the houses at half the price. The House of Lords set the entire sale aside.

Principle of the l.c.

A solicitor has an unfair advantage over his client, therefore the contract not being between equals is not free. In other words, there is a presumption of undue influence. The question in the l.c. whether Watt was a gratuitous or paid adviser was immaterial. The important fact was that he was the only adviser *in hac re*, i.e. in the particular transaction in question. There was fiduciary relationship between him and the vendors, and therefore full disclosure ought to have been made. Therefore the case came within *Lewis* v. *Hillman* (3 H. L. C. 607); *Charter* v. *Trevelyan* (11 Cl. & F. 714), which were non-disclosure cases, and not within *Montesquieu* v. *Sandys* (18 Ves. 301); *Cane* v. *Allen* (2 Dow. 289), which were *non in hac re* cases.

Lord Cairns said, paraphrasing Lord St. Leonards: "Take the case of a sale of any kind which is so fair, so reasonable as to price, so entirely free from anything else that is obnoxious, as to be capable of being supported; yet if there has entered into that sale this ingredient, that the client has not been made aware that the real purchaser is his law agent, if the purchase has been made in the name of some other person for that law agent, that is a sale that cannot be supported:" l.c., p. 264, *Lewis* v. *Hillman* (3 H. L. C. 630).

"The law, both in England and in Scotland," said Lord Blackburn, "is that in such cases we do not inquire whether it was a good bargain or a bad bargain before we set it aside. The mere fact that you, being in circumstances which made it your duty to give your client advice, have put yourself in such a position that being the purchaser yourself you cannot give disinterested advice, your own interests coming in conflict with his, that mere fact authorizes him to set aside the contract if he chooses to do so." And he continued, "If he purchases from his client in a matter totally unconnected with what he was employed in before, no doubt an attorney may purchase from one who has been his client just as any stranger may do, honestly telling the truth and without any fraudulent concealment, but being in no respect bound to do more than any other purchaser would do. But when he is purchasing from a person property with respect to which the confidential relation has existed or exists, it becomes wrong of him to purchase without doing a great deal more than would be expected from a stranger."

Solicitor purchasing from client.

As a rule, positive misrepresentation is required to avoid a contract, *Peek* v. *Gurney* (L. R. 6 H. L. 377)*, but here concealment is construed as misrepresentation: for this is a contract *uberrimæ fidei*, and full disclosure is necessary; as is the case wherever the parties are in the position of adviser and advised: *Tate* v. *Williamson* (2 Ch. 55). And it is something more, for the adviser has exceptional means of knowledge, and therefore influence over his client. Hence in order that a transaction of this nature may stand, some other similar influence is required to countervail his own. It is only then that he is really "at arm's length" with his client. His client should be advised by an independent solicitor, and the solicitor must really act as such: *Barnard* v. *Hunter* (5 W. R. 92); *Miller* v. *Cook*, *ante*, p. 74. There are, however, *dicta* that the help of a fresh solicitor is not essential, *e.g.* in *Cane* v. *Allen* (2 Dow. 289); and in *Spencer* v. *Topham* (22 B. 573), *Edwards* v. *Meyrick* (12 L. J. Ch. 49), sales by a client to a person who was habitually his solicitor were upheld, although no fresh solicitor was employed. In similar cases not referring to solicitors independent advice is not essential: *Hunter* v. *Atkins* (3 My. & K. 113, 137). Nor may he bid at auctions, *Ex p. James* (8 Ves. 337); *Downes* v. *Grazebrook* (3 Mer. 209), as trustees sometimes may (see below). See *Bellamy* v. *Sabine* (2 Ph. 425).

Sales by the client's trustee in bankruptcy to client's solicitor, *Adam* v. *Sworder* (2 D. J. & S. 44); *Luddy's T.* v. *Peard* (33 Ch. D. 500), or to the solicitor to the trustee in bankruptcy, *Ex p. James*, but see *Ex p. Watts* (De G. 265), are on the same footing.

Counsel, etc.

Similarly with counsel, *Carter* v. *Palmer* (8 Cl. & Fi. 657), and solicitor's clerks: *Hobday* v. *Peters* (28 B. 349).

Mortgages.

A solicitor taking security from a client must not insert unusual powers—*e.g.* of sale—unless he points this out to his client and is prepared to prove that he has done so: *Cockburn* v. *Edwards* (18 Ch. D. 449), yet an immediate power of sale is not an unusual power in an arrangement for giving time for paying a debt presently payable: *Pooley's T.* v. *Whetham* (33 Ch. D. 111, 122). See *Cockell* v. *Taylor* (15 B. 103).

Settled accounts and releases, etc.

Settled accounts will be reopened, *Revett* v. *Harvey* (1 Si. & S. 502); *Charter* v. *Trevelyan* (11 Cl. & F. 714); releases set aside (*ib.*); a purchaser may have to account as mortgagee in possession, *Adam* v. *Sworder*; purchases are set aside (l.c.); debts may not be retained, *In re Birt* (22 Ch. D. 604), and the solicitor is trustee of benefits obtained: *Hobday* v. *Peters*; *Carter* v. *Palmer*; Lord Eldon's judgment in *Gibson* v. *Jeyes* (6 V. 266); Lord Cottenham's in *Holman* v. *Loynes* (4 D. M. & G. 270).

Gifts, etc., to a solicitor.

The solicitor is trustee of advantages obtained by him through a deed being negligently drawn by him. Unusual provisions are proof of negligence unless he can show that his client knew that they were unusual and insisted on them: *Bulkley* v. *Wilford* (2 Cl. & F. 102), followed in *Horan* v. *Macmahon* (17 Ir. R. 641); *Lovesy* v. *Smith* (15 Ch. D. 655) (bridegroom-solicitor); *Segrave* v. *Kirwan* (Be. 157) (conveyancer), and distinguished in *Stokes* v. *Prance* ([1898] 1 Ch. 212) (solicitors' contributory mortgage).

Gifts from a client.

In *Rhodes* v. *Bate* (1 Ch. 252), where the confidential agent was a conveyancer, Turner, L.J., applied "the well-established principle of this Court," that "persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the Court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them."

In *Morgan* v. *Minett* (6 Ch. D. 645) the capacity and intentions of the donor to make a gift were proved; but "the law," said Bacon, V.C., "is that while the relationship of solicitor and client subsists the solicitor cannot take a gift from his client. It is not said that the relation prevents a client bestowing his bounty upon his solicitor, but what the law requires is that, considering the enormous influence which a solicitor in many cases must have over his client, in order to give validity and effect to a donation from a client to his solicitor that relation must be severed. If that can once be established, there is an end to the influence; whatever the influence may have been before need not be inquired into; and then the client may as well give to a solicitor as give to any other person. The degree of influence need not be inquired into. The fact of the influence is enough if it be established. These Courts have not those golden scales which are said to be used in the mythological heaven to regulate the destinies of mankind."

Rhodes v. *Bate* was followed in *Liles* v. *Terry* ([1895] 2 Q. B. 679), where a settlement by a client on herself for life with remainder to her niece, who was her solicitor's wife, was upset on the sole ground that the settlor had not had independent legal advice.

Liles v. *Terry* was followed in *Barron* v. *Willis* ([1900] 2 Ch. 121), where solicitor suggested and client refused independent advice. Compare *Goddard* v. *Carlisle* (9 Price, 169); *Tyars* v. *Alsop* (61 L. T. 8).

These recent cases as to gifts by clients establish a stricter rule than the older cases, *e.g. Harris* v. *Tremenheere* (15 Ves. 34). And contrast *Oldham* v. *Hand* (2 Ves. 259) with *Broun* v. *Kennedy* (33 B. 133, 148); but in the last-mentioned case (which was one of counsel and client) there was also an element of blackmailing. Nor would these rules be applied so strictly to other cases of constructive undue influence. Thus in *Hunter* v. *Atkins* there was no third party to advise. In *Harrison* v. *Guest* (*ante*, p. 74 (15)) the facts were as in *Barron* v. *Willis*, and the decision was the opposite.

What are gifts.

Most of these gift cases are cases of so-called remuneration for past services. Extra charges to a trustee solicitor, like gifts, were only allowed in *Stanes* v. *Parker* (9 B. 385); *In re Wyche* (11 B. 209); *Lyddon* v. *Moss* (4 D. & J. 104), to which *c.q.t.* consented after his eyes had been opened by another solicitor.

Gifts by will.

Gifts by will have been questioned in the Chancery Division: *Walker* v. *Smith; Hindson* v. *Weatherill, infra,* but it seems that they are questions for the Probate Division only. They rest on another footing: *Parfitt* v. *Lawless* (L. R. 2 P. & D. 462). But the Court throws on a beneficiary the onus of proving that a will prepared by him, *Fulton* v. *Andrew* (L. R. 7 H. L. 469); *Tyrrell* v. *Painton* ([1894] P. 159), or prepared by a solicitor on his instructions, *Brown* v. *Fisher* (63 L. T. 465), or in beneficiaries' handwriting, *Donnelly* v. *Broughton* ([1891] A. C. 435), was testator's real will, and will refuse probate either of the whole will or of the particular clause: *Fulton* v. *Andrew; Rhodes* v. *R.* (7 A. C. 192). A solicitor must prove that he explained the particular clause to testator: *Walker* v. *Smith* (29 B. 394); *Hindson* v. *Weatherill* (5 D. M. & G. 301). A power in a will for a solicitor trustee to charge profit costs, *In re Barber* (31 Ch. D. 665; 34 Ch. D. 77); *In re Pooley* (40 Ch. 1); *In re White* ([1898] 2 Ch. 217), and any remuneration for services in carrying out a will, *In re Thorley* ([1891] 2 Ch. 613), is a legacy (*post,* p. 223).

Trustee and *cestui que trust.*

Purchases.

Sales to a trustee for sale, if he has accepted the trusteeship, *Stacey* v. *Elph* (1 M. & K. 195); *Clark* v. *C.* (9 A.C. 733), or to an executor, *ib., Beningfield* v. *Baxter* (12 A. C. 167): *In re Worssam* (46 L. T. 584); *Gray* v. *Warner* (16 Eq. 577), are under a similar law: *Fox* v. *Mackreth* (W. & T. L. C. ii. 709)*. So are sales to trustees in bankruptcy, *Ex p. Lacey* (6 V. 625), *Ex p. Bennett* (10 V. 381), or for a bankrupt, *Vaughton* v. *Noble* (30 B. 34). As a rule, they may not buy as principals or agents (*Ex p. Bennett*), nor may their partners, *Ex p. Moore* (45 L. T. 558). Sales, *A. G.* v. *Dudley* (Coop. 146), or leases *Passingham* v. *Sherborn* (9 B. 424); *A. G.* v. *Clarendon* (17 V. 491) will be set aside. Or a resale will be ordered, the reserve price being the price paid by the trustee *plus* his net "ameliorating waste," *Ex p. Bennett, Ex p. Hughes* (6 V. 617); if resold the *c.q.t.* to take the profit; if not, the trustee to take the property and pay the costs, *ib.*, and *Lister* v. *L.* (6 V. 632). Or the *c.q.t.* may claim such profits when reaped by the trustee on a re-sale, *Whichcote* v. *Lawrence* (3 Ves. 739), or as lessee, *Ex p. Hughes.* A trustee for sale may buy "provided there is a distinct and clear contract ascertained to be such after a jealous and scrupulous examination of all the circumstances that the *c.q.t.* intended the trustee should buy; and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee:" per Lord Eldon, *Coles* v. *Trecothick* (9 Ves. 234, 247). In this case and in *Clarke* v. *Swaile* (2 Ed. 134), and in *Morse* v. *Royal* (12 Ves. 355), the only *c.q.t.* were of age, and conducted the sale; so that their "distinct and clear contract with their trustee" was equivalent to his being removed from his trusteeship to sell. The *c.q.t.* must be unanimous: *Franks* v. *Bollans* (3 Ch. 717). It is so hard to prove that these sales are valid that purchasers may decline a title deduced from trustee-purchasers from themselves: *Williams* v. *Scott* ([1900] A. C. 499). The Court may allow a trustee to bid: *Campbell* v. *Walker* (5 Ves. 678); *Tennant* v. *Trenchard* (4 Ch. 547); *Boswell* v. *Coaks* (23 Ch. D. 302, 11 A. C. 232); and then the sale will stand. It allowed a trustee to buy the trust property in *Farmer* v. *Dean* (32 B. 327). It confirmed a sale already made by a trustee to himself and others in *Hickley* v. *H.* (2 Ch. D. 190); and compare *Delves* v. *D.* (20 Eq. 77), where the purchaser's agent was the vendor's trustee, and as such conducted the sale. But if the Court allows him to buy, such is his duty to disclose that it hardly seems possible that he can re-sell at a profit and keep those profits to himself unless he allows a long interval to elapse: *In re Pease* (unreported). "It is naught, it is naught, saith the buyer, but when he is gone his way then he boasteth." Yet the Court wishes him to say the same thing as buyer before sale and after sale as re-seller. These cases rest on the same principles as those governing purchases by solicitors *in hac re.* The *dicta* that a trustee for sale cannot in any case buy, *e.g.* in *Cane* v. *Allen* (*ubi supra*, p. 300); *Denton* v. *D.* (23 B. 285, 290); *Luff* v. *Lord* (34 B. 220, 227, 11 L. T. 695), are subject to the above-mentioned exceptions. In *Knight* v. *Marjoribanks* (2 M. & G. 10) the sale was unimpeachable because the trustee was not trustee *in hac re.* Re-sales to a trustee will not be annulled on suspicion only: *In re Postlethwaite* (37 W. R. 200). An ex-trustee's contracts, *Spring* v. *Pride* (4 D. J. & S. 395), and the contracts of a trustee who is not trustee for sale when he buys from a *c.q.t.*, *Scott* v. *Davis* (4 M. &. C. 87); *Plowright* v. *Lambert* (52 L. T. 646), are contracts *uberrimæ fidei.* His position resembles that of a solicitor where a new solicitor *in hac re* has been appointed. See *Denton* v. *Donner, Luff* v. *Lord;* and for the parallel of solicitor and trustee see *Downes* v. *Grazebrook* (3 Mer. 209).

Gifts.

Although Lord Eldon said, "It is almost impossible in the course of connection of guardian and ward, attorney and client, trustee and *c.q.t.*, that a transaction shall stand purporting to be bounty for the execution of an antecedent duty," *Hatch* v. *H.* (9 Ves. 292), cases of bounty (or "bonus") by *c.q.t.* to trustees are rare, and nearly all turn on the use of actual undue influence: *Ellis* v. *Barker* (7 Ch. 104), or imposition: *Barrett* v. *Hartley* (2 Eq. 789), but see *Wheeler* v. *Sergeant* (3 R. 663) (executor).

Parent and child.

The following are analogous cases of sales and gifts. Transactions between parent and child, except *Carpenter* v. *Herriot* (1 Ed. 338), and a few such cases, are all cases of that peculiar kind of sale known as family arrangements or gifts.

Thus *Baker* v. *Bradley* (7 D. M. & G. 597), *Wallace* v. *W.* (2 Dr. & Wa. 466), *Hoghton* v. *H.* (15 B. 278, 300–06)†, were pure gifts disguised as re-settlements and were set aside. Again, in *Savery* v.

King (5 H. L. C. 627) and *Turner* v. *Collins* (7 Ch. 329) a son on coming of age voluntarily gave property to his father's nominee; the same solicitor was employed, and there was no evidence of independent consent by the son. This by itself constituted undue influence. Here the gifts were reversionary; but not so in *Wright* v. *Vanderplank* (8 D. M. & G. 133); *Everitt* v. *E.* (10 Eq. 405); *Powell* v. *P.* ([1900] 1 Ch. 243) (stepmother). In *Hannah* v. *Hodgson* (30 B. 19) father and son sold to a purchaser, who paid the purchase-money to the father. The purchaser was refused specific performance. For sales by father to son, see Farwell on Powers, ed. 2, p. 407.

Re-settlements for value are treated under the head of family arrangements (*post*, pp. 112, 113).

Analogous cases.

The person whose influence is assumed to be undue may also be an ex-guardian, as in *Everitt* v. *E.*; *Hylton* v. *H.* (2 Ves. 547); *Archer* v. *Hudson* (7 B. 551), or elder sister, *Harvey* v. *Mount* (8 B. 439), or servant, *Osmond* v. *Fitzroy* (3 P. W. 129); *Bridgman* v. *Green* (2 Ves. 626), acting as guardian. Compare *Griffiths* v. *Robins* (3 Mad. 192); contrast *Taylor* v. *Johnston* (19 Ch. D. 603) (gift by infant valid). In *Huguenin* v. *Baseley* (W. & T. L. C. i. 247), the donee was administering the donor's property like a guardian or trustee. A mother-in-law's influence is not presumed to be undue: *Shafto* v. *Adams* (4 Giff. 492).

A gift by a nun to a nunnery, *Whyte* v. *Meade* (2 Ir. Eq. 420); *Fulham* v. *McCarthy* (1 H. L. C. 703), but see *In re Metcalfe's T.* (2 D. J. & S. 122), by a sister of mercy to a sisterhood, *Allcard* v. *Skinner* (36 Ch. D. 145), but see *post*, p. 84, by a devotee to a prophet, *Nottidge* v. *Prince* (2 Giff. 246), by a fanatic to a Stiggins, *Norton* v. *Relly* (2 Ed. 286) (but not *bonâ fide* religious gifts, *Kirwan* v. *Cullen* (4 Ir. Ch. R. 322)), by an ex-lunatic to his ex-keeper with whom he boarded, *Wright* v. *Proud* (13 Ves. 136), by a patient to his doctor, *Ahearne* v. *Hogan* (Dr. 310); *Popham* v. *Brooke* (5 Russ. 8); *Ashwell* v. *Lomi* (2 P. & D. 477) (will case); *Dent* v. *Bennett* (4 My. & Cr. 269); *Mitchell* v. *Homfray* (8 Q. B. D. 587), but see *Pratt* v. *Barker* (1 Si. 1), by Juliet to Romeo, *Cobbett* v. *Brock* (20 B. 524), by Anna Karenina to her unlawful lord, *James* v. *Holmes* (4 D. F. & J. 470), have been treated as voidable on similar grounds; but there was the trail of fraud of deepest dye tainting that gift by a dupe to a spiritualist in *Lyon* v. *Home* (6 Eq. 655), by an invalid to a religious quack in *Morley* v. *Loughnan* ([1893] 1 Ch. 736).

Law as to agents and principal

Agents and sub-agents who get a lease of, *Taylor* v. *Salmon* (4 M. & C. 134), or sell and re-buy, *Erskine* v. *Sachs* ([1901] 2 K. B. 504), or buy and re-sell at a profit, *De Bussche* v. *Alt* (8 Ch. D. 286), their employer's property, or take secret commissions from the other side, *Lister* v. *Stubbs* (45 Ch. D. 1), without their employer's consent, are trustees of such lease profit or commissions for their employers. These cases lie on the neutral territory to which the common law of agency and the equitable doctrine of trusts lay equal claim (see Stirling, J.'s, judgment in *Lister* v. *Stubbs*).

applies to directors and company,

Directors (D.) are essentially agents for the company (Y.), and as such may not buy and re-sell shares which they are directed to issue, *Parker* v. *McKenna* (10 Ch. 96), nor buy from their co-directors, *Hodgkinson* v. *National, etc., Ins. Co.* (4 D. & J. 422), may not carry on nor may their partners carry on business with the company, *Imp. Mercantile Ass.* v. *Coleman* (L. R. 6 H. L. 189), unless the articles of association otherwise provide *S. C.* (6 Ch. 558), *Costa Rica Ry. Co.* v. *Forwood* ([1901] 1 Ch. 746), without accounting for such profits. But profits on contracts with D. entered into before incorporation are exempt, because there was no principal then in being: *Albion Steel Co.* v. *Martin* (1 Ch. D. 580).

and to promoters, directors, and company,

Payments made to D. after incorporation in pursuance of a contract with the promoter (P.) before incorporation—*e.g.* of "fully paid up shares"—must be refunded, *Hay's case* (10 Ch. 593); *McKay's Case* (2 Ch. D. 1); *Nant-y-Clo* v. *Grave* (12 Ch. D. 738); *In re Postage Stamp Automatic Delivery Co.* ([1892] 3 Ch. 566). Contracts by P. to indemnify D. against calls, *Archer's Case* ([1892] 1 Ch. 322); issues of shares to directors on more favourable terms than to shareholders, *Alexander* v. *Automatic T. Co.* ([1900] 2 Ch. 56); *Shaw* v. *Holland* ([1900] 2 Ch. 305), compensation to D. by X. on purchasing Y.'s property, Y. being still in being, and such compensation not being a bribe, *Kaye* v. *Croydon Tramways Co.* ([1898] 1 Ch. 358); *Southall* v. *British M. L. A. Soc.* (6 Ch. 614), are under the same rule. Y. "has the option of claiming what is given or its value, *i.e.* the highest value whilst held by the directors," per Lindley, L.J., in *Eden* v. *Ridsdales Ry. Lamp Co.* (23 Q. B. D. 368); but see *Shaw* v. *Holland*, *supra;* and General Roberts found in *In re Carriage, etc., Association* (27 Ch. D. 322) that the liability of directors is joint as well as several. A dead principal cannot remunerate its servants: *Hutton* v. *West Cork Ry. Co.* (23 Ch. D. 654).

and equity reinforces common law;

Up to this point equity simply adds a remedy to common law agency. The liability and powers of the principal quâ principal begin and end at its (statutory) birth and death. Outside these limits the law of agency cannot extend.

equity also reaches beyond the limits of this law; to promoters' cases before the company is formed;

We now pass beyond the limits of the common law of agency, where equity alone can avail.

Promoters (P.) are constructive trustees for Y. in case D. are only aliases of P. The contract in such cases is like that between solicitor and client, trustee and *c.q.t.*: there are not two independent parties. See *Erlanger* v. *New Sombrero Co.* (3 A. C. 1218, 1230)*; *Lagunas Co.* v. *L. Syndicate* ([1899] 2 Ch. 392, 442 *et seq.*), and *Gluckstein* v. *Barnes* ([1900] A. C. 240)*.

Such promoters "appoint themselves sole guardians and protectors of this creature of theirs half-fledged and just struggling into life, bound hand and foot while yet unborn by contracts tending to their private advantage and so fashioned by its makers that it could only act by their hands and only see through their eyes" (*ib.* p. 248). The self-constituted guardian must therefore account to his constructive *c.q.t.* for any unusual profits he made at their expense: *Emma Mining Co.* v. *Grant* (11 C. D. 918)*; *Whaley Bridge Co.* v. *Green* (5 Q. B. D. 109); *Lydney & Co.* v. *Bird* (33 Ch. D. 85). Distinguish *Ex parte Hesketh* (78 L. T. 368). Thus if "P." were constructive trustees for Y., when they bought the property which they resold to "Y.," then they are jointly and severally liable to refund to Y. the difference of price: *Gluckstein* v. *Barnes* ([1900] A. C. 240)*. They were trustees for the then unborn Y. if they bought the property in order to create Y. and re-sell it to Y., *ib.*, but not if they meant to work it either as directors of X. or as partners or even as a syndicate, and then as an afterthought sold to Y.: *Bentinck* v. *Fenn* (12 A. C. 652)*, followed in *Ladywell Mining Co.* v. *Brookes* (35 Ch. D. 400), *In re Lady Forrest Mine* ([1901] 1 Ch. 582). The transaction between P. and D. must be a sham—like those transactions between persons who unduly influence one another—in order to make P. constructive trustee for Y.

and to liquidators' cases after the company ceases to exist.

Lastly, a sale by the liquidator to the liquidator will be set aside with liability to account for mesne profits but not interest thereon: *Silkstone Coal Co.* v. *Edey* ([1900] 1 Ch. 167). Further, a sale by P. to D. where P. and D. are the same people—practically—and where D. do not disclose their interest in the contract, *Bentinck* v. *Fenn* (12 A. C. 652, 658); *Lagunas Co.* v. *L. Syndicate*; *Gluckstein* v. *Barnes*, or other circumstances which may have induced the contract is voidable by the shareholders of Y. on the ground of misrepresentation, if rescission is still possible. But this is the only remedy.

These relations are *sui generis.*

In no other sense can directors be regarded as the trustees of their shareholders within the meaning of this chapter. A sale by P. to D. can be accepted by Y., although P., D., and Y. are practically the same man, so as to bind creditors, etc., *Salomon* v. *S. & Co.* ([1897] A. C. 22); *In re Wragg* ([1897] 1 Ch. 796); *Hadley & Co.* v. *H.* (77 L. T. 131); *Lagunas Co.* v. *L. Syndicate* ([1899] 2 Ch. 392); because the relation between D. & Y. is *sui generis* and not precisely parallel to that between solicitor and client (Rigby, L.J., *dissentiente*).

As to gifts.

As for gifts, an open gift for duty done is valid: *Southall* v. *British M. L. A. Soc.* (6 Ch. 614); and the knowledge of the then shareholders supports a transaction: *In re British Seamless Paper Box Co.* (17 Ch. D. 467). But Y. cannot ratify a bribe by strangers to D., *Lagunas Co.* v. *L. Syndicate* ([1899] 2 Ch. 392), such gifts by Y. being *ultra vires*: per Vaughan Williams, L.J.

Ratification.

"In order to sustain such a gift you must have something after the confidential relation has ceased amounting to a release of the client's right to set aside the gift," and a declaration of intention or payment of a bill, *Tyars* v. *Alsop* (36 W. R. 919), is insufficient, Compare *Moxon* v. *Payne* (8 Ch. 881). It is only Philip sober who can confirm the gifts of Philip drunk: *Matthews* v. *Baxter* (L. R. 8 Exc. 132). In *Allcard* v. *Skinner* (*ubi supra*) six years' acquiescence by the donor, although she still held to her vows (*dissentiente* Cotton, L.J.), in *Mitchell* v. *Homfray* (*ubi supra*) four years, in *Salmon* v

Cutts (4 De G. & S. 125) three years, in *Lyddon* v. *Moss* (4 De G. & J. 104) fourteen years, in *Champion* v. *Rigby* (1 R. & M. 539) eighteen years' acquiescence was held in the circumstances of each case enough; in *Savery* v. *King* (*ubi supra*) twelve years, in *Hatch* v. *H.* (*ubi supra*) twenty years' acquiescence was held not to imply ratification. Knowledge of the wrong done and of the remedy for it is necessary, besides exemption from the influence in question. In *Salmon* v. *Cutts* specific performance was refused in spite of the ratification. See, too, *Walmesley* v. *Booth* (2 Atk. 25); *Erlanger* v. *New Sombrero Phosphate Co.* (3 A. C. 1218, 1230)*. Ratification by a company of profits made by a director behind its back is only effectual after such director has explained the nature and amount of such profits: *Dunne* v. *English* (18 Eq. 535)†; *Costa Rica Ry. Co.* v. *Forwood* ([1901] 1 Ch. 761). Compare *In re Lady Forrest Mine* ([1901] 1 Ch. 589). In ratifications by a company it must be mentioned that the shareholders are *sui juris*, and only join it by free contract, and are at a distance from their agents so that independent advice, surprise, and the like are elements which may be left out of account.

Generally.

In all the above cases there is one principle, but many rules. For there are infinite gradations of dominion exercised by the dominant over the servient mind: *Hunter* v. *Atkins* (3 My. & K. 113, 139); and the kind of advantage which a solicitor has over his client is *sui generis*. And there are degrees in gifts; thus it would be pedantry not public policy to object to trifling gifts: *Rhodes* v. *Bate* (*ubi supra*). In these cases, as in those discussed in the last chapter, circumstances trivial in themselves—like deafness (*Hatch* v. *H.*) or blindness (*Griffiths* v. *Robins*)—will reinforce the presumption of undue influence.

Victims of Mistake—Mistake of Law.

ROGERS *v.* INGHAM.

(3 Ch. D. 351.)

Principle.

The Court will only relieve against a payment of money under mistake of law if there be some equitable ground which renders it inequitable that the party who received the money should retain it.

Summary of facts.

An executor took the opinion of counsel with regard to the construction of a will, and was advised that a legatee was not entitled to certain interest which had been paid to her. The legatee also took the opinion of her counsel, which was to the same effect. The executor then divided the estate, and the legatee accepted her share in accordance with these opinions. Two years afterwards the legatee commenced an action submitting another construction of the will and claiming repayment on that basis, but it was held that such an action could not be maintained.

The C. A. upheld the decision of Hall, V.C., to the effect that it was too late in the day to consider the question whether a proper construction had been put upon the will, and that the plaintiff could not be relieved on the ground that there was a common mistake of law.

Mistake in construction of deeds, etc., is mistake of law.

In deciding the l.c. the C. A. assumed that a mistake in the construction of an instrument was a mistake of law so far as the question of relief is concerned. Similarly, specific performance was decreed against defendant, who misconstrued a document in *Powell* v. *Smith* (14 Eq. 85); and *Hart* v. *H.* (18 Ch. D. 690); and vendor's delay in completing a contract, being due to a misconstruction of it, was regarded as "wilful default": *In re Pelly & Jacob's C.* (80 L. T. 45); and compare *Eaglesfield* v. *Marquis of Londonderry* (4 Ch. D. 693); *Ex parte Sandys* (42 Ch. D. 98); *Stewart* v. *Kennedy* (15 A. C. 108); *In re Champion* ([1893] 1 Ch. 101, 111); *Wilding* v. *Sanderson* ([1897] 2 Ch. 534).

There are, however, *dicta* to the contrary. Thus Lord Chelmsford said in *Earl Beauchamp* v. *Winn* (L. R. 6 H. L. 223, 234): "With regard to the objection that the mistake (if any) was one of law, and that the rule, *Ignorantia juris neminem excusat*, applies, I would observe upon the peculiarity of this case" (as to which, see *post*, p. 92) "that the ignorance imputable to the party was of a matter of law arising upon the doubtful construction of a grant. This is very different from the ignorance of a well-known rule of law. And there are many cases to be found in which equity upon a mere mistake of the law, without the admixture of other circumstances, has given relief to a party who has dealt with this property under the influence of such mistake." But Lord Chelmsford was more accurate when, in the *Midland Railway, etc., Directors* v. *Johnson* (6 H. L. C. 798, 811), he said the opposite: "The construction of a contract is clearly matter of law, and if a party acts on a mistaken view of his rights under a contract, he is no more entitled to relief in equity than he would be at law."

Acquiescence.

It was decided also in the l.c. that acquiescence by the *c.q.t.* in what the trustee did, operated as an equitable estoppel, so that the act of the trustee was to all intents and purposes her act, and a payment by him was a payment by her. Thus, too, in *In re Hulkes* (33 Ch. D. 552), the executors paid away certain funds, the income of which they ought to have paid to H., but paid H. a part of these funds, and rendered him accounts and sent him a copy of the will. All these payments were due to a mistake in construing the will; and it was held that H. had made himself a party to this mistake, and could not, therefore, claim arrears of income after lying by for two years. Chitty, J., said that the executors were entitled to say, "Common error there was, we acted on it and you never complained, and therefore we are still entitled as between us to the benefit of your long acquiescence" (p. 561). Contrast *Hilliard* v. *Fulford* (4 Ch. D. 389).

"Action for money had and received" the only equity.

And it was decided in the l.c. that payments under a mistake of this kind, even if they cannot be construed as payments to compromise a doubtful claim (and Mellish's (L.J.) judgment hinted that this was a compromise), and therefore for value, are adequately provided for by the quasi-equitable action for money had and received (l.c. p. 355); and that equity would not interfere, unless persons in a fiduciary relation, or, he might have added, officers of the Court were concerned.

"No authority whatever," said James, L.J., "has been cited to us in support of the proposition that an action for money had and received would lie against a person who has received money from another, with perfect knowledge of all the facts common to both, merely because it was said that the claim to the money was not well founded in point of law. Of course cases of that kind must have continually occurred, and yet no case has been produced in which a suit of this kind has succeeded." If it were true that equity would grant relief in a case like the present, "it must be true in respect of any case in the High Court of Justice where money has been paid under a mistake as to legal rights, and it would open a fearful amount of litigation and evil in cases of distribution of estates. Where people have a knowledge of all the facts and take advice, and whether they get proper advice or not, the money is divided and the business is settled, it is not for the good of mankind that it should be re-opened by one of the parties saying, 'You have received your money by mistake. I acquiesced in your receipt of it under that mistake, and therefore I ask you to give it to me back.'"

Exceptions.

The first apparent exception to this rule is where persons are in a fiduciary relation, as in *Bingham* v. *B.* (Belt's Sup., Ves. Sen., p. 81), where plaintiff's mistake in law was due to defendant's advice, and defendant was a scrivener and conveyancer (*ante*, pp. 76 *et seq.*): *Pickering* v. *P.* (2 B. 31) was also a solicitor and client case. Secondly, where there are circumstances pointing to fraud on one side: *Broughton* v. *Hutt* (3 D. & J. 501). Thirdly, if trustee overpays *c.q.t.* under a mistake of law, he can deduct from future payments the amount so overpaid. This comes from his right to impound (see *post*, p. 216): *Livesey* v. *L.* (3 Russ. 287). Fourthly, if B. induces

A.'s erroneous construction of a document, A. may set it aside, not on the ground of common error, but of misrepresentation by B.: *Stewart* v. *Kennedy* (15 A. C. 108); *Wilding* v. *Sanderson* ([1897] 2 Ch. 534). Fifthly—and this is the first real exception—if a company amalgamates with another company, and such amalgamation is

Ultra vires.

"*ultra vires*," a creditor who has renounced may resume his rights against the first company. He is to this extent relieved against his mistake in law: *In re Saxon Life Ass. Soc.* (2 J. & H. 408). But Page-Wood, V.C., rested his decision in this case on *Stone* v. *Godfrey* (5 D. M. & G. 76), which he cited for the proposition that equity will relieve against mistakes of law. *Stone* v. *Godfrey* was, however, a case of mixed law and fact (like *Cooper* v. *Phibbs*, *infra*), in which plaintiff was told that the law depended on the facts, and made an error only in the facts. Nor was it a case of construing any document. Compare *Allcard* v. *Walker* ([1896] 2 Ch. 381). It is safer, therefore, to regard *ultra vires* cases as standing by themselves. This particular case cannot recur (*post*, p. 300). Sixthly, election, *post*, p. 306 (22). Seventhly, where by mistake of law money has been

Trustee in bankruptcy, and other officers of the Court:

paid to an officer of the Court. In *Ex parte James* (9 Ch. 609) a trustee in bankruptcy was ordered to repay money. James, L.J., in delivering judgment said: "I am of opinion that a trustee in bankruptcy is an officer of the Court. He has inquisitorial powers given him by the Court, and the Court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors. The Court, then, finding that he has in his hands money which in equity belongs to some one else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people." And, further, the trustee in bankruptcy will be ordered to refund such payments not only out of money in his hands, but out of other moneys afterwards coming to his hands: *Ex parte Simmonds* (16 Q. B. D. 308).

"The Court," said Lord Esher, "will direct its officer to do that which any high-minded man will do, not to take advantage of the mistake of the law. This rule is not confined to the Court of Bankruptcy. If money had by a mistake of law come into the hands of an officer of the Court of Common Law, the Court would order him to repay it as soon as the mistake was discovered. Of course, as between litigant parties, even a Court of Equity would not prevent a litigant

(receiver)

from doing a shabby thing. But I cannot help thinking that if money had come into the hands of a receiver appointed by a Court of Equity through a mistake of law, the Court would, when the mistake was discovered, order him to repay it." This was done in *In re Rhoades* ([1899] 2 Q. B. 347, 355).

In *In re Brown* (32 Ch. D. 597), where trust money in the hands of a trustee had been paid to his trustee in liquidation by a mistake of law, the Ch. D. ordered him to refund it. Kay, J., said: "A Court of the Ch. D. does not consider itself bound to act on principles less honest than the Court of Bankruptcy; and if this money was really paid to the trustee in the liquidation in mistake of law, I have no hesitation in saying that he must repay it, and if any order of the Court of Bankruptcy were necessary for that purpose, I presume the Court would make such order."

Similarly in *In re Opera* ([1891] 2 Ch. 154; [1891] 3 Ch. 260), was stated. Kekewich, J., said: "If the assets in the hands of an officer of the Court on behalf of creditors or others have been increased by a transaction occasioned by an honest mistake of law, then, notwithstanding such mistake is not capable of rectification as between ordinary adverse litigants, the Court will compel its officer to recognize the rules of honesty as between man and man and to act accordingly." The C. A., while admitting the accuracy of the principle stated, was unable to apply it to the circumstances of that case. Costs paid to a solicitor under an order of Court which decides in his favour, cannot be recovered from him (although he is an "officer of the Court") on the order being reversed on appeal. The proper course is to obtain an undertaking to repay: *Hood Barrs* v. *Crossman* ([1897] A. C. 172).

(solicitor)

Company Law.

A company is not bound if its directors make payments which are *ultra vires*: the mistake of law is not a mistake of law by the company, so that the company can recover such payments: *Blackburn, etc., B. B. Soc.* v. *Cunliffe Brooks & Co.* (29 Ch. D. 902, 910). If directors deal as such with a bank and overdraw—loans to the company being *ultra vires*—the bank cannot go against the directors; because it allowed the overdraft under a mistake of law, not in consequence of a misrepresentation of fact: *Beattie* v. *Lord Ebury* (7 Ch. 777) (cited [1901] 1 Ch. 351). *Post*, pp. 294, 295.

Foreign Law.

A mistake as to foreign law is a mistake of fact: *Leslie* v. *Baillie* (2 Y. & C. 91). A mistake by a foreign Court of English law is a mistake of fact: *Godard* v. *Gray* (L. R. 6 Q. B. 139).

Awards.

A mistake of law admitted as such by an arbitrator authorizes the review of an award: *Dinn* v *Blake* (L. R. 10 C. P. 388), *In re Palmer & Co.* ([1898] 1 Q. B. 131)†.

Mistake of title.

A mistake as to one's rights (*jus*) is generally a mistake of fact and law. The Court apparently assumes that it is a mistake of fact, unless it is proved to be a mistake of law. See next case.

Victims of Mistake—Mistake of Fact.

COOPER *v.* PHIBBS.

(L. R. 2 H. L. 149.)

Principle.

Where a contract is entered into bonâ fide *under a mutual mistake of fact, either party is entitled to be relieved from it.*

Summary of facts.

An owner in fee simple of Irish estates, including a salmon fishery, having become a lunatic, an application was made to Parliament for an Act to improve the fishery, and the Act was passed shortly after the lunatic's decease. The Act, after reciting that the fishery in question had descended to and was vested in E. J. Cooper as heir-at-law of the lunatic, and that the said E. J. Cooper was desirous of constructing certain works to improve the fishery, "on the terms that the exclusive right of fishery should in consideration thereof be vested in and confirmed to him, his heirs and assigns," proceeded to confer upon him the requisite powers. Under these powers E. J. Cooper spent large sums upon the improvement of the fishery, and always considered and stated that by the Act he was made owner in fee of the fishery. As a matter of fact, E. J. Cooper was only entitled to the fishery as trustee for the persons beneficially entitled under a prior settlement, *i.e.* for himself for life with remainder to E. Cooper. On E. J. Cooper's death all parties assumed, from statements made by E. J. Cooper, that he was owner in fee of the fishery, and that therefore, while the lands passed to E. Cooper under the settlement, the fishery passed direct from E. J. Cooper to his daughters. Phibbs, the daughters' trustee, then agreed to lease the fishery for a term of years to E. Cooper. Shortly afterwards E. Cooper read the Act of Parliament, and believing that, under the provisions thereof and of the settlement, the fishery really belonged to himself, applied to the Court to have the agreement set aside. The House of Lords decided that the agreement, having been made in mutual mistake, must be set aside, and directions were given for ascertaining the amount expended by E. J. Cooper, the House holding that his estate was entitled to a lien upon the fishery for that amount.

Mistake of private right is not mistake of law.

In deciding this case Lord Westbury drew a hard-and-fast distinction between "*jus*" in the sense of law and "*jus*" in the sense of "private right." "In such a state of things," said Lord Westbury, "there can be no doubt of the rule of a Court of Equity with regard to the dealing with that agreement. It is said, '*Ignorantia juris haud excusat;*' but in that maxim the word '*jus*' is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake." These cases "lie on the very border of the two kinds of error, and are rather to be classed among instances of error in fact than in law;" per Lord Brougham, L.C., in *Clifton* v. *Cockburn* (3 My. & K. 76, 99).

Jessel, M.R., illustrated the distinction thus: "Suppose a man is asked by a tradesman whether he can give credit to a lady, and the answer is, 'You may; she is a single woman of large fortune.' That is a statement of fact. If he had told him the whole story and all the facts" (that she had gone through an apparently invalid ceremony of marriage) "that would have been a misrepresentation of law:" *Eaglesfield* v. *Marquis of Londonderry* (4 Ch. D. 693, 703).

So here E. J. Cooper had told E. Cooper, not that such and such an Act contained such and such a clause, the effect of which was to give the fishery to E. J. Cooper, but that he was so entitled. And E. Cooper relied upon what his uncle said. And it made no matter that he might, if he chose, have consulted the Act.

Six illustrations.

The following six cases prove what a thin yet firm partition separates cases of *jus* in the sense of title from cases of pure construction, *i.e.* *jus* in the sense of law.

Vendor and purchaser.

(1) In *Wauton* v. *Coppard* ([1899] 1 Ch. 92) Vendor (V) told Purchaser (P) that there was nothing in a deed subject to which he was buying to prevent his erecting a boys' school. But there was a restrictive covenant against noise. V. had believed that boys are not noisy; but the Court held (as a question of construction and therefore of law) that they were. P. rescinds, and recovers deposit.

Surrender.

(2) V. having divorced his wife, surrenders property derived from her. The divorce is invalid. This was a mistake of fact—as to what he was surrendering: *M'Carthy* v. *Decaix* (2 R. & My. 614). (See 11).

Deed of exchange.

(3) In *Earl Beauchamp* v. *Winn* (L. R. 6 H. L. 223) a claim was made to set aside a deed of exchange, on the ground that the late Earl Beauchamp had executed it on an erroneous supposition common to both parties, as to certain rights conferred by a deed of 1799 on his predecessor in title. Lord Chelmsford said: "If the late Earl, at the time of the treaty for the exchange, had taken the trouble to examine his title deeds, he would have found the grant of 1799," but this negligence was insufficient to disentitle him to relief in equity.

Lease.

(4) In *Willmott* v. *Barber* (15 Ch. D. 96) a lessor was allowed to disprove alleged acquiescence in acts of his under-lessee by saying that he did not at the time of those acts know of certain clauses in the lease which he himself had granted. Conversely forty years' mutual misconstruction of a lease did not entitle a lessee to resist an action brought on its proper construction: *N. E. Ry. Co.* v. *Hastings* ([1900] A. C. 260).

Mortgage.

(5) In *Daniell* v. *Sinclair* (6 App. Cas. 181) a mortgage deed (1865) authorized simple interest. In 1869 the mortgagee admitted by deed liability for an amount which assumed that compound interest had been payable up to that date. In 1872 the mortgagee signed accounts which had been calculated upon the same assumption. No money passed. It was held that since 1869 (and in spite of the signed accounts in 1872) only simple interest was recoverable. The parties had made a common mistake as to what was their own agreement. No request was made to cancel or rectify the admission of 1869, so that it is difficult to see how far the question whether this was a mistake in law or in fact was raised.

(6) In *King* v. *Stewart* (66 L. T. 339) a mortgagor had punctually paid interest at 5 per cent. to a trustee in ignorance that on punctual payment the rate of interest was reducible to 4 per cent., and the trustee had paid the money to the *c.q.t.* The trustee was liable to repay the excess of interest he had received. The mortgagor was allowed to say that both parties had forgotten the contents of their own mortgage deed before it was a year old. Compare *Davies* v. *Morier* (2 Coll. 303). Other recent cases of the same kind were actions for money had and received: *Durrant* v. *Eccl. Com.* (6 Q. B. D. 234); *Midland Ry. Co.* v. *Withington L. B.* (11 Q. B. D. 788); *Moore* v. *Fulham V.* ([1895] 1 Q. B. 399); *Ward* v. *Wallis* ([1900] 1 Q. B. 675); and they too draw the same fine, though not faint, line between mistakes of law and fact.

The following illustrations are grouped round the remedies applied in cases of mistake as to title in a lease (16); reversion (12), (20), (32); or otherwise (7), (13), (14), (30), (31), (33), (38), (44); parcels (15), (17), (18), (19), (27), (28), (39), (40), (42) to (46), *e.g.* in a release (9), (10), (11), or other misdescription (8), (21), (30), (31), (35), (37), (41); value (22), (36); gift (29), etc.

Passive remedies.

We begin with passive remedies. In the following illustrations relief was granted except where the opposite is stated. Passive remedies are those where the Court ignores dispositions founded on mistake.

(7) P. bought property, which before completion, but after accepting the title, he discovered to be his own. The discovery was made from documents dated prior to the root of title prescribed by the conditions of sale. There had been a mutual mistake. Although P. ought to have known his own title deeds, and although there was a condition of sale precluding investigation into the documents of this date, P. resisted specific performance: *Jones* v. *Clifford* (3 Ch. D. 779), *In re Scott & Alvarez's C.* ([1895] 2 Ch. 603). P. does not recover his deposit (*ante*, p. 68).

(8) V. innocently sells a brothel as an eligible residence. The Court refuses specific performance and rescission: *Hope* v. *Walter* ([1900] 1 Ch. 257). Compare (15), (35), *infra.*

(9) "The general words 'a release' are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given," *per* Lord Westbury in *L. & S. W. Ry. Co. Directors* v. *Blackmore* (L. R. 4 H. L. 623), applied in *Turner* v. *T.* (14 Ch. D. 829).

(10) A release by legatees to an executor contained a recital that £19 8s. was the legacy duty payable, and was retained in order to be paid. More was payable, and paid by the executor. He was not estopped from claiming the balance from the legatees: *Brooke* v. *Haymes* (6 Eq. 25).

(11) Two ladies who were entitled to quarter shares in a residuary personal estate, valued at £42,000, executed a release to the trustee of the will in consideration of the receipt of £10,500 each. But before payment each quarter share had become worth much more than £10,500. The release had been drawn by the trustee's solicitor, and the ladies had had no independent advice, and did not know of the increase in value. The ladies' claim to the increase in value was not barred by the release: *In re Garnett* (31 Ch. D. 1). These cases are also cases of sales by *c.q.t.* to trustee (*ante*, p. 80). The Court declared that the release "is not to be treated as a binding release of all claims." Compare *Cann* v. *C.* (1 P. W. 123); *Pusey* v. *Desbouverie* (3 P. Wms. 315); *Anon* (31 Beav. 310); *Farewell* v. *Coker* (cited 2 Mer. 353). Compare (2), *supra.*

(12) Remaindermen (R.) and life-tenant (T.)'s trustee in bankruptcy in October, not knowing that T. died in September, agree that if the trustee defers cutting timber, the timber, when cut, shall be taken as

cut in August. A declaration that this is binding is refused: *Cochrane* v. *Willis* (1 Ch. 58). See (32).

(13) P. buys shares not knowing that the company is being wound up; the Court will not put him on the list of contributories: *Emmerson's Case* (1 Ch. 433).

(1) Bilateral partial mistakes. (Cases on compensation),

In the following illustrations the mistake was by both parties and (1) partial:—

(14) P. finds that after completion part of the premises belong to strangers and pays them £300 therefor. The clause giving compensation for misdescription is inapplicable. The error not being *in substantialibus* does not justify rescission: *Caveat emptor: Debenham* v. *Sawbridge* ([1901] 2 Ch. 98)†; *In re Tyrrell* (82 L. T. 675).

(15) Where there is no such clause P. cannot enforce the contract with compensation, although V. cannot without compensation: *In re Terry and White's C.* (32 Ch. D. 14)†. Compare *Cordingley* v. *Cheeseborough* (4 D. F. & J. 379).

(16) Lessee grants an underlease for a term longer than his lease; underlessee cannot claim compensation, there being no clause for compensation for mistakes. It was too late to claim rescission, resist specific performance, etc.: *Besley* v. *B.* (9 Ch. D. 103); *Clayton* v. *Leach* (41 Ch. D. 103)†. Distinguish *Okill* v. *Whittaker* (2 Ph. 338), where P. took all he could get; also (19). See *post*, p. 361.

(17) A contract mentioning 1300 yards, and allowing compensation for misdescription, was enforceable by V. with compensation when V. only had 1000 yards: *In re Fawcett and Holmes' C.* (42 Ch. D. 157)†; or where there were unexpected manholes: *In re Brewer and Hawkins' C.* (80 L. T. 127).

(18) The contract is for 36 acres at £3600, the land being defined on three sides. When fully defined it is 42 acres. V. cannot enforce the sale of 42 acres for £4200. P. can enforce the sale of 36 acres for £3600, the error being easily remediable: *North* v. *Percival* ([1898] 2 Ch. 128).

(19) P. after completion finds out that the land is 5 acres instead of 6 acres, and the contract allows compensation for misdescription. P. gets compensation, *In re Turner and Skelton* (13 Ch. D. 130). So at common law an assumpsit lies: *Palmer* v. *Johnson* (13 Q. B. D. 351); *Mostyn* v. *West M. Co.* (1 C. P. D. 145).

(20) V. sells a reversion to P. at an undervalue; and both parties estimate succession duty at £87. It is only £7. The mutual mistake is ground for compensation only: *Bettyes* v. *Maynard* (49 L. T. 389).

(rectification),

(21) User of No. 13 staircase is granted in a demise of 13 and 14. There was no staircase in No. 13, but was one in 14. Rectification is allowed: *Cowen* v. *Truefitt* ([1899] 2 Ch. 309).

(22) The rent in a lease is "£130;" £230 was intended. Rectification is allowed: *Garrard* v. *Frankel* (30 B. 445).

(23) Bankruptcy proof was rectified in *In re London, Bombay, etc., Bank* (9 Ch. 686); *Ex parte Bagshaw* (13 Ch. D. 304); *Lloyd's Bank* v. *Bullock* ([1896] 2 Ch. 195); accounts in, (5), *supra.* Clerical and

similar slips in a judgment can be corrected by application to the Court which made the slip: *Miller* v. *Swire* (30 Ch. D. 239); *Hatton* v. *Harris* ([1892] A. C. 547); *Milson* v. *Carter* ([1893] A. C. 638); *e.g.* an error as to costs, *Chessum* v. *Gordon* ([1901] 1 K. B. 694)†; subject to this principle, a consent order can only be upset by an action: *Ainsworth* v. *Wilding* ([1896] 1 Ch. 673); *Preston Banking Co.* v. *Allsup* ([1895] 1 Ch. 141).

(spent contract), (24) A. and B. are entitled by agreement with C. to the proceeds of sale of a ship. B.'s right under the agreement to be satisfied in priority to A. is declared by order of Court; and he is so satisfied. No action for rectification of the agreement will lie, as the agreement is spent: *Caird* v. *Moss* (33 Ch. D. 22).

(injunction), (25) B. by mistake paid money entrusted to him by A. to a bank, which was a creditor of A. When the bank was told that "a mistake was made, an equity was fastened upon them not to alter the position of the fund until the mistake could be repaired:" *Colonial B.* v. *Exchange B.* (11 A. C. 84). As to whether writing off debts is to be regarded as tantamount to paying away money, *quære* (*ib.* p. 89). Compare *post*, pp. 200, 201.

(and estoppel). (26) A ward of Court represents to the Court that she owns freeholds *x.*, *y.*, and *z.*, which are accordingly under an order of the Court conveyed to the trustees of her ante-nuptial settlement. But *x.* had been sold, and the proceeds of sale were in Court. The Court on learning of this will direct payment of the proceeds of sale of *x.* to the trustees: *Mills* v. *Fox* (37 Ch. D. 153). This seems to have been a case of equitable estoppel, or obligation to make good your representation, within the meaning of *Citizens' Bank of Louisiana* v. *First Nat. B. of L.* (L. R. 6 H. L. 352, 360); and therefore inapplicable to voluntary settlements: *Lovett* v. *L.* ([1898] 1 Ch. 82).

(2) Bilateral fundamental mistakes. Where the entire basis or subject-matter of the contract or sale is the subject of mistake, the proper remedy is rescission upon equitable terms as in the l.c., and (3), *supra*, not in a vendor and purchaser summons: *In re Young and Harston's C.* (31 Ch. D. 168). *Post*, p. 330.

(Cases on recission.) (27) "A consent order can be impeached upon any grounds which invalidate the agreement it expresses:" per Lindley, L.J., in *Huddersfield Banking Co.* v. *Lister & Son* ([1895] 2 Ch. 273, 280). Here the mistake was as to parcels included; also in *Allcard* v. *Walker* ([1896] 2 Ch. 369).

(28) The order in *Wilding* v. *Sanderson* ([1897] 2 Ch. 534) included interest by mistake, *post* (46). Compare *Great N. W. C. Ry. Co.* v. *Charlebois* ([1899] A. C. 114).

(29) Gifts like sales, if induced by innocent misrepresentation of fact, are voidable in equity: *In re Glubb* ([1900] 1 Ch. 354), but see *Wilson* v. *Thornbury* (10 Ch. 239).

(30) V. sell "five acres on a lake," on a forty-year title. They had a possessory title to five acres on a lake, and a forty-year title to four acres somewhere near. There was a condition that errors should not

annul the sale or give rise to compensation. Purchaser rescinds the contract and gets his deposit back: *Jacobs* v. *Revell* ([1900] 2 Ch. 858).

(31) "This Court is from time to time approaching the nearer to the doctrine that a purchaser shall have that which he contracted for, or not be compelled to take that which he did not mean to have," per Lord Eldon in *Knatchbull* v. *Grueber* (3 Mer. 146) was cited and applied in *In re Arnold* (14 Ch. D. 279, 284), and in *Jacobs* v. *Revell.* Compare *Flight* v. *Booth* (1 Bingh. N. C. 370); *Portman* v. *Mill* (2 Russ. 570); *Whittemore* v. *W.* (8 Eq. 603), discussed in *Jacobs* v. *Revell.*

(32) V. sells a reversion to P.; the purchase is set aside, his joint-tenant being dead at the date of sale: *Colyer* v. *Clay* (7 B. 188). See (12).

(1) Partial unilateral mistakes. (*Caveat emptor.*)

Where the mistake is unilateral, and (1) where it is partial—

(33) *Caveat emptor* applied in *Tamplin* v. *James* (15 Ch. D. 215), where P. mistook the parcels, although the particulars described them correctly. James, L.J., said: "If a man will not take reasonable care to ascertain what he is buying, he must take the consequences. . . . It is not enough for a purchaser to swear, 'I thought the farm sold contained twelve fields which I knew, and I find it does not include them all;' or, 'I thought it contained a hundred acres, and it only contains eighty.' It would open the door to fraud if such a defence was to be allowed." And Baggallay, L.J., cited the following passage from the judgment in *Swaisland* v. *Dearsley* (29 Beavan, 430), as containing a correct statement of the law: "The principle on which the Court proceeds in cases of mistake is this—if it appears upon the evidence that there was in the description of the property a matter on which a person might *bonâ fide* make a mistake, and he swears positively that he did make such a mistake, and his evidence is not disproved, this Court cannot enforce the specific performance against him. If there appears on the particulars no ground for the mistake, if no man with his senses about him could have misapprehended the character of the parcels, then I do not think it is sufficient for the purchaser to swear that he made a mistake, or that he did not understand what he was about." And compare the converse case of *caveat* vendor in *Okill* v. *Whittaker*, (16). So if the error is one of title and *in substantialibus*: *Soper* v. *Arnold* (14 A. C. 429).

(34) A. compromises an action with B., though ignorant of a material fact (which B. knows but has no duty to disclose). A. cannot rescind his compromise, as this is ignorance, not mistake: *Turner* v. *Green* ([1895] 2 Ch. 205).

(Compensation and misrepresentation).

(35) V.'s boundaries are invisible. P. is misled by visible boundaries, and resists specific performance: *Denny* v. *Hancock* (6 Ch. 1). Compare *Baskcomb* v. *Beckwith* (8 Eq. 100), where a plan misled P.

(36) V. in the sale of a colliery innocently misrepresent its accounts. They only get specific performance with compensation: *Powell* v. *Elliot* (10 Ch. 424).

(37) V. says a road is "made up;" the Court and P. think not; there is a clause for compensation, which is granted on a summons in an action administering V.'s estate: *In re Chifferiel* (40 Ch. D. 45).

(38) V. misrepresents his copyholds as freeholds; P. can enforce specific performance with compensation: *Mortlock* v. *Buller* (10 V. 315); *Barnes* v. *Wood* (8 Eq. 424). Distinguish *Castle* v. *Wilkinson* (5 Ch. 534) (both knew); *Hopcraft* v. *H.* (76 L. T. 341) (neither knew defect); *Rudd* v. *Lascelles* ([1900] 1 Ch. 815) (freeholds subject to restrictive covenants).

(39) P. offers to take 249 acres on lease at £500 a year; V.'s agent accepts, thinking the offer is only for 214 acres. P. can compel V. to let to him 214 acres at a rental reduced *pro ratâ*: *Mckenzie* v. *Hesketh* (7 Ch. D. 675).

(40) V. contracts to sell his English patents to P., who thought that he was contracting to buy from V. his English and foreign patents. P. can bring specific performance for the sale of the English patents: *Preston* v. *Luck* (27 Ch. D. 497).

(Rescission)

(41) V. contracts to sell houses "like those in lot 4." Auctioneer says at the sale, "but they have privies and no entrance halls." P. does not hear this. There is a condition of sale that misdescription shall give rise to compensation. P. cannot enforce sale with compensation. Rescission is granted: *In re Hare & O'More's C.* ([1901] 1 Ch. 93)†.

(or rectification by consent).

(42) V. lets a house to P., but means to reserve the first floor, and thinks he is doing so. V. may rescind the lease unless P. permits him to rectify his error, in which case the error will be rectified: *Paget* v. *Marshall* (28 Ch. D. 255). Compare *Harris* v. *Pepperell* (5 Eq. 1); *Garrard* v. *Frankel* (30 B. 445). Joyce, J., thinks that these were cases of fraud, as the cases did not otherwise seem to justify rescission: *May* v. *Platt* ([1900] 1 Ch. 616). Rectification of course can only be by consent if the mistake is unilateral.

(43) V. grants land to P., reserving minerals; P. did not intend minerals to be reserved, and did not know that this was so; as to V. *quære.* V. may accept rectification or rescind. If P. does not accept rescission, his action is dismissed: *Bloomer* v. *Spittle* (13 Eq. 427). See (40).

Total unilateral mistakes. (Rescission.)

(44) (2) Where it is total:—in the *Duke of Sutherland* v. *Heathcote* ([1892] 1 Ch. 475), P. having, though ignorant of the fact, a concurrent right with V. to work certain minerals, took a lease of the mineral rights from V. On becoming aware of his rights, P. sought to have the lease set aside or rectified. The Court held that there was no mistake common to both parties, and that therefore there were no materials for rectifying the lease; but P. could have the lease set aside on equitable terms, one of which was the giving up possession of the property leased. As P. was unwilling to do this, the lease could neither be rectified nor set aside.

(45) In *Hickman* v. *Berens* ([1895] 2 Ch. 638)† counsel under a

misapprehension initiated a compromise made in Court which was accordingly set aside (*post*, p. 111).

(46) V.'s innocent misrepresentation *in substantialibus* justifies rescission: *Wilding* v. *Sanderson*, cited *ante*, p. 88 and p. 95 (28). See (1), *supra*.

Practice in rectification.

The usual practice is to endorse the rectifying order of the Court on the instrument rectified: *White* v. *W.* (15 Eq. 247, 250), see Seton, 5th ed., p. 1441. It was held in *Olley* v. *Fisher* (34 Ch. D. 367, citing Fry on S. P., 3rd ed. p. 375) that the Court has, since the *Judicature Act*, jurisdiction in every case in which the *Statute of Frauds* is not a bar, to rectify a written agreement upon parol evidence of mistake (*post*, p. 344), and to order specific performance of the rectified agreement in the same action. See *Pearson* v. *P.* (27 Ch. D. 145, 148, 149), where parol evidence was admitted on a counter-claim for rectification. For counter-claims involving a claim to rescind see *Hirschfeld* v. *L. B. & S. C. Ry. Co.* (2 Q. B. D. 1). Jurisdiction to rectify a re-settlement is not excluded by its having been enrolled under the *Fines and Recoveries Act*: *Hall-Dare* v. *H.* (31 Ch. D. 251).

"Rectification, setting aside and cancellation of deeds or other written instruments, is by sect. 34 of the *Judicature Act*, 1873, specially assigned to the Ch. D. But under sect. 24, sub.-sect. 2, any other Division may treat a deed as set aside if the facts are such as to justify its cancellation in the Ch. D.: *Mostyn* v. *West Mostyn, etc., Co.* (1 C. P. D. 145).

Infants' Control and Custody.

In re **AGAR-ELLIS, AGAR-ELLIS** *v.* **LASCELLES.**

(10 Ch. D. 49.)

Principle.

A father has a right to control the religious education of his infant children, but such right may be forfeited or abdicated. The Court requires a stronger case to induce it to interfere with the father than with a testamentary guardian.

Summary of facts.

A Protestant on his marriage with a Roman Catholic promised her that all the children should be brought up as Roman Catholics. After the birth of the first child he determined that all his children should be brought up as Protestants, and gave express directions to that effect, but the mother, without the father's knowledge, so indoctrinated the children (who were of ages varying from nine to twelve), that at last they refused to go to a Protestant Church. The father made them wards of Court. The C. A. granted an injunction to restrain the mother from taking the children to confession, or to any other than a Church of England place of worship.

The father as spiritual autocrat.

After pointing out that the ante-nuptial promise was void, see *Andrews* v. *Salt* (8 Ch. 622); *In re Violet Nevin, an Infant* ([1891] 2 Ch. 299), the Court addressed itself to the main question, that between father and children. "The right of the father," said James, L.J., "to the custody and control of his children is one of the most sacred of all rights. No doubt the law may take away from him the right, or may interfere with his exercise of it, just as it may take away his life or his property or interfere with his liberty, but it must be for some sufficient cause known to the law. He may have forfeited such parental right by moral misconduct or by the profession of immoral or irreligious opinions deemed to unfit him to have the charge of any child at all, or he may have abdicated such right by a course of conduct which would make a resumption of his authority capricious and cruel towards the children. But in the absence of some conduct by the father entailing such forfeiture or amounting to such abdication, the Court has never yet interfered with the father's legal right. It is a legal right with no doubt a corresponding legal duty, but the breach or intended breach of the duty must be proved by legal evidence before that right can be rightfully interfered with."

The Court refused to examine the children privately and to satisfy themselves by that examination that the children had, in the language of *Stourton* v. *S.* (8 D. M. & G. 760), "received religious impressions to a depth and an extent rendering dangerous and improper any attempt at important changes in them, and so to satisfy themselves that the father was about to abuse his parental authority by seeking to disturb such religious convictions," because that had only been done in the case of a testamentary guardian, a case of mere trust, which is essentially under the jurisdiction of the Court and under a jurisdiction always exercised with the widest judicial discretion, and a parent was more than guardian. Compare *In re Agar-Ellis* (24 Ch. D. 317, 327, 328).

No declaration was made as to the religion in which the children were to be brought up "so as to throw on the father the whole responsibility of doing then and during the remaining years of his children's respective minorities what was right and proper. The only point upon which there was any doubt was whether the Court should interfere at all, whether the Court, recognizing the father's undoubted right as king and ruler of his own family, could be called on by him to be ancillary to the exercise of his jurisdiction, and whether he ought not to be left to enforce his commands by his own authority within his own domain."

Jurisdiction over infants without property,

The Court has two kinds of jurisdiction. (1) As delegate of the Sovereign, who is *parens patriæ*: *In re Spence* (2 Ph. 247); cited in *Queen* v. *Gyngall* ([1893] 2 Q. B. 232, 240, 246)†. As this jurisdiction extends over children without property, the only thing that the Court can do in that case is to appoint, *In re Scanlan* (40 Ch. D. 200), and remove or refuse, *In re McGrath* ([1893] 1 Ch. 143), to remove and appoint guardians. Or the same object may be obtained by granting, *Barnardo* v. *McHugh* ([1891] A. C. 388)†, or refusing, *Queen* v. *Gyngall*, a *habeas corpus* to the guardian. In the last case "those who had the actual guardianship" gave "undertakings;" and in *In re Scanlan* the Court gave "directions" as to the education of the infant; but further than this the Court will not go: *In re McGrath* (p. 147).

In re McGrath,

Courts of equity acted, and now all Courts act, towards illegitimate mothers on the analogy of their action towards legitimate fathers: *Barnardo* v. *McHugh*, citing *Reg* v. *Nash* (10 Q. B. D. 454), &c. Compare *Humphrys* v. *Polak* ([1901] 2 K. B. 385). But where an application is made for the production or custody of a child and the Court deprives "a parent" (*i.e.* "any person at law liable to maintain" it or entitled to its custody) of its custody under the *Custody of Children Act*, 1891, the Court has power to make any order which it thinks fit "to secure that the child be brought up in the religion in which the parent has a legal right to require" it to be brought up; regard being had to the power of the Court to consult the child's wishes.

and with property.

(2) If the infant is a ward of Court (see note) a scheme for its maintenance and education will, in addition, be made, and injunctions against taking it to this or that place of worship are often granted: *In re Newbery* (1 Ch. 263). Where since the *Judicature Act*, 1873, the K. B. D. grants or refuses a *habeas corpus* for any of these purposes, it will exercise its jurisdiction according to the principles and practice of the Ch. D.: *In re Goldsworthy* (2 Q. B. D. 75); thus it will examine boys under fourteen and girls under sixteen as to their views and wishes, although it would not have done so previously to that Act: *Queen* v. *Gyngall*, at p. 251; *In re Agar-Ellis* (24 Ch. D. 326).

Statutory jurisdiction of the Chancery Division.

The wardship of infants is one of those matters which are assigned to the Ch. D. by the *Judicature Act*, 1873 (s. 34). Applications to remove, confirm, and appoint guardians, and applications by a mother for the custody of or right of access to an infant, and applications by guardians for direction under the *Guardianship of Infants Act*, 1886, are made to the Ch. D. or to the County Court: if made to the latter they may be removed to the Ch. D. at the instance of any party. This Act supersedes 36 Vict. c. 12, under which the Court of Chancery had a like power with regard to infants up to the age of sixteen. The Act of 1886 will not be applied where an order as to custody has been already made in the Divorce Court: *Manders* v. *M.* (63 L. T. 627). When applied it leaves the widest discretion to the Court to override the rule that the father has the custody and control of his children: *In re A. & B.* ([1897] 1 Ch. 786).

The father's power as to religion and education continues after his death.

The rule that a father has the custody and control of his children means that he controls their education and religion; indeed, his religious control extends beyond his lifetime, for the guardian of his children must carry out the actual or presumed religious wishes of the father; and this rule applies whether such guardian is appointed by deed or will by the father under 12 Car. II. c. 24 (this statute only applies to a legitimate child, *Sleeman* v. *Wilson* (13 Eq. 36), and only enables a father under age to appoint guardians by deed since the *Wills Act* (1 Vict. c. 56)); or in like manner by the mother under the *Guardianship of Infants' Act,* 1886 (this statute does not expressly enable a mother who is a minor to appoint guardians, although it probably has this effect, *In re D'Angibau* (15 Ch. D. 228), and during the father's life it only enables her to appoint guardians subject to confirmation by the Court in the event of his misconduct jointly with him: *In re G.* ([1892] 1 Ch. 292)); and whether (before the Act of 1886) there being no guardian appointed by the father the widowed mother became "guardian by nurture" of her sons until fourteen and her daughters until sixteen; or (since the Act of 1886), the widowed mother became statutory guardian either alone or jointly with a guardian appointed by the father or Court, for as statutory guardian she only has the powers of a guardian appointed under 12 Car. II. c. 24, and is removeable or subject to control in the interests of the infant: *In re Newbery* (1 Ch. 263); *Hawksworth* v. *H.* (6 Ch. 539); *Skinner* v. *Orde* (L. R. 4 P. C. 60); *D'Alton* v. *D'A.* (4 P. D. 87); *In re X.* ([1899] 1 Ch. 526); *In re G.* ([1899] 1 Ch. 719). The Court will not appoint a guardian jointly with her merely because she marries a second husband who is not of the religion of her first husband: *In re X.* ([1899] 1 Ch. 526)*.

Exceptions in case of (1) misconduct, etc.

(1) The father, however, can be deprived of these privileges by misconduct. Thus in *Wellesley* v. *W.* (2 Bli. N. S. 124) the father lived an openly "immoral" life. See *Criminal Law Am. Act*, 1885, s. 12; and compare *Warde* v. *W.* (2 Ph. 786) and *In re Halliday's E.* (17 Jur. 56), which were cases under the *Infants' Custody Act*, 1839, and *In re Taylor* (4 Ch. D. 157); *In re Elderton* (25 D. 220), which were cases under the *Custody of Infants' Act*, 1873. *Smart* v. *S.* ([1892] A. C. 425) was a case under the inherent jurisdiction of the Court; and the misconduct consisted of drunkenness and gross accusations made against his wife. Compare *In re Besant* (11 Ch. D. 508), a case under 36 Vict. c. 12, s. 2, as to which see *Condon* v. *Vollum* (57 L. T. 154).

In re Besant proves that the Court will deprive a person entitled under a separation deed to the custody of an infant for publishing an obscene book and for opinions which it regarded as atheistic. In *Shelley* v. *Westbrooke* (Jac. 266) the poet's alleged atheism, combined with his adultery and desertion, produced the same result. It is often said that the profession of irreligious views is alone sufficient to induce the Court to deprive a father of the custody of his children: having regard to remarks about dissenters in *In re Newbery*, that would be a dangerous power for the Court to exercise; but the peril to the children, which is the sole ground of intervention, "cannot be fixed for one age by the standard of another," *Smart* v. *S.* (p. 432); and the maxim that "The Court judicially administering the law cannot hold one religion to be better than another" ([1893] 1 Ch. 149) will doubtless expand and develop. In the wars of churches militant, Roman Catholics have over and over again won: *Hawkesworth* v. *H.*†; *Barnardo* v. *McHugh*; *In re Clarke* (21 Ch. D. 817); *Davis* v. *D.* (10 W. R. 245), and the same duties and rights would exist "if the child were the child of a Jew, a Parsee, a Mahommedan, or Buddhist:" *In re Besant* (at p. 520).

(2) Abdication of right to religious control.

(2) The father may abdicate his right to require that the children should be brought up in his religion. Thus he may on his deathbed commend his children to the care of relatives of an alien creed, *In re Violet Nevin* ([1891] 2 Ch. 299), although deathbed recommendations may only be signs of vacillation, *Andrews* v. *Salt* (8 Ch. 641), and the views of vacillators and Galleos will not be regarded as of importance: *In re McGrath* ([1893] 1 Ch. 143); or he may have allowed his children to be baptized in an alien church, *Hill* v. *H.* (10 W. R. 400), *In re Clarke*, although this alone is not conclusive, *In re Violet Nevin*, *In re McGrath*, and the children may in consequence have resided with other people and acquired other convictions which it would be injudicious to disturb. In these cases the Court refused to assist in carrying out the father's intentions. For in these cases the interests of the children are paramount. But the policy of not disturbing the religious views acquired by a child of eight or eleven years old was not regarded as of importance in *Hawksworth* v. *H.*, *Andrews* v. *Salt*; but see *Stourton* v. *S.* (8 D. M. & G. 760) commented on in 6 Ch. 543. In *In re Newton* ([1896] 1 Ch. 740), the father of infants, fifteen and eleven years old, "deliberately allowed his children to be brought up as members of the Church of England until it is too late for him to insist on the desired change" to Roman Catholicism. But this case was mixed; for neglect brought this case under the third class as well. On the other hand, this case was peculiarly strong, as the father was alive.

(3) Abdication of custody.

(3) Desertion and inability to provide for a child, *In re Ethel Brown* (13 Q. B. D. 614), *Queen* v. *Gyngall* ([1893] 2 Q. B. 232), may disentitle a living father or widowed mother respectively to insist on their "natural rights" of custody. Permission that the children should look for present and future maintenance to other people, *Lyons* v. *Blenkin* (Jac 245)—from which, limited delegated custody must be distinguished, *Barnardo* v. *Ford* ([1892] A. C. 326)—will add weight

to this plea. The Court will not, however, prefer a child's pecuniary interest to what a father would have regarded as its spiritual interests: *Talbot* v. *Earl of Shrewsbury* (4 My. & Cr. 672). The welfare which the Court regards is its moral, religious, and physical welfare—its welfare all round: per Lindley, L.J. ([1893] 1 Ch. 148); per Lord Esher, M.R. ([1893] 2 Q. B. 242).

(4) Re-moval out of the jurisdiction.

(4) Again, if a father removes or seeks to remove his children, being wards of Court, out of the jurisdiction he will be restrained by injunction from doing so: *Rochford* v. *Hackman* (Kay, 308); *In re Plomley* (47 L. T. 283); but permission was granted in *In re Callaghan* (28 Ch. D. 186). But if the wards are foreigners who have a foreign guardian appointed by a foreign Court permission will be granted and the foreign guardian will be entitled to their exclusive custody when abroad: *Nugent* v. *Vetzera* (2 Eq. 704).

(5) Other cases.

(5) The *Custody of Children Act*, 1891 (54 Vict. c. 3), makes abandonment and desertion of a child, or a permission that it should be brought up at another person's expense under circumstances which imply that the parent was unmindful of his duty, grounds for refusing custody to a parent (sect 3). Sect. 1 has apparently altered ([1893] 2 Q. B. 237); but in spite of *Barnardo* v. *McHugh* ([1891] A. C. 388), it may be doubted how far sect. 3 has altered the principles upon which the Court has always acted. Perhaps, however, it shifts on to the parent the onus of proving that he or she is a fit person to have custody of the child. Deprivation of custody under this Act may be accompanied by an order that the infant shall be brought up in the religion on which its parent has a legal right to insist, and there are important provisions as to expenses of maintenance in sect. 2.

In making orders for custody and right of access upon the application of a mother under the Act of 1886, the Court will have regard to "the welfare of the infant," "the conduct of the parents," and "the wishes as well of the mother as of the father."

NOTE.—*Wards of Court.*

An infant with property becomes a ward of Court (1) if an action is commenced in his name; (2) if an order is made on petition or summons for the appointment of a guardian; (3) if an order is made in like manner for maintenance; (4) if a fund belonging to an infant is paid into Court under sect. 42 of the *Trustee Act*, 1893, in so far as it replaces the (repealed) *Trustee Relief Acts*, 1847 & 1849. But payments into Court under the same section in so far as it replaces the (repealed) *Legacy Duty Act*, 1796 (s. 32), and payments into Court under the *Lands' Clauses Act*, 1845, and orders approving an infant's settlement under the *Infants' S. Act*, 1855, do not have this effect. The authorities are given in Simpson on Infants, 2nd ed. p. 241. In *Brown* v. *Collins* (25 Ch. D. 56), it was considered doubtful whether the mere carrying over a fund to the separate account of an infant, in an action to which the infant is not a party, constitutes the infant a ward in Court. The jurisdiction is discretionary, and is not exercised in the case of an alien infant resident abroad: *ib.*, *In re Bourgoise* (41 Ch. D. 310).

Maintenance and Accumulation.

In re **HOLFORD, HOLFORD** *v.* **HOLFORD.**

([1894] 3 Ch. 30.)

Principle.

(1) *Where a bequest is made to a class of children contingently on their attaining twenty-one, the capital representing the then share of the first child who attains twenty-one then vests in him, and if the class is not liable to be increased is then payable to him.*

(2) *If the bequest carries the right to intermediate income, the income of the then prospective share of each minor is payable towards his maintenance under sect.* 43 *of the Conveyancing Act,* 1881; *but the residue is accumulated, and if not applied as income under the same Act, follows the destination of the capital.*

(3) *The second rule applies after as well as before the first rule has been applied.*

Summary of facts.

H. Holford devised and bequeathed his real and personal estate to trustees upon trust to convert and stand possessed of his net residuary trust funds upon trust to divide the same equally among the children of his brother, T. Holford, who should be living at his decease and attain twenty-one. There was no express provision for maintenance and accumulation. There were six children of the class mentioned; and the trustees of the marriage settlement of the eldest child when she attained twenty-one claimed (1) the capital, *i.e.* one-sixth of the residuary trust funds, and (2) the accumulations thereon. This claim was conceded. But her trustees also claimed (3) the income of the entire "residuary trust funds" until the next child attained twenty-one, then of half thereof until the third child attained twenty-one, and so on. The C. A. (affirming Chitty, J.) disallowed this claim, and declared that the income of the five-sixths was payable in the same way as before the eldest child attained twenty-one.

Principle of the l.c.

There is no broad principle of equity involved in the l.c.; but it set at rest a question which meets every lawyer in his everyday practice, and as to which *In re Jeffery* ([1891] 1 Ch. 671) had introduced confusion. *In re Jeffery* was overruled, and the common-sense rules stated above were restored. *In re Jeffery* rested on a clever fallacy. It was said if you specifically devise leaseholds to children ætat. twenty-one, the first who attains twenty-one gets a vested share in the whole, and therefore gets the whole income, of which he is divested *pro tanto* as his brothers and sisters attain twenty-one: *Furneaux* v. *Rucker* ([1879] W. N. 135). Messrs. Wolstenhome and Brinton's fourth edition of the C. A., 1881, etc. (1891), pointed out the error in this reasoning, as in *Furneaux* v. *Rucker* it was assumed that the bequest did not carry income; consequently the *C. A.* did not apply: *In re Judkin's T.* (25 Ch. D. 743); *In re Dickson* (29 Ch. D. 331). In *Furneaux* v. *Rucker* the eldest son was only entitled to the whole income as against the residuary legatees or next of kin: *Guthrie* v. *Walrond* (22 Ch. D. 573); and no statute protected them against him. Similarly in *In re Averill* ([1898] 1 Ch. 523) the question lay between the eldest contingent equitable devisee and the heir; and the rule in *Furneaux* v. *Rucker* was applied. Here the question was as between the eldest daughter and her brothers and sisters, and the *C. A.* (1881) stepped in between them and directed the trustees to do what, but for statute, they would have had no power to do—namely, to pay income to a minor out of a fund to which he might or might not become entitled, and so as to divest the rights of other people to such income so applied. As for the accumulations, if the share had been vested liable to be divested on attaining twenty-one, the tenant for life of the share would, on attaining twenty-one, be entitled to them: *In re Humphreys* ([1893] 3 Ch. 1); and it is presumed from the arguments in that case that they would belong to the remainderman if the legacy were contingent on attaining twenty-one. For accumulations go to the same destination and are subject to the same conditions as the income which they represent: *Long* v. *Ovenden* (16 Ch. D. 691); *Finlay* v. *Darling* ([1897] 1 Ch. 719). And the rule, both as to income and accumulations, independently of Statute Law, is that they are regarded as "accessions" and go along with that which they belong to. The lamb and the ewe are precedents for the income and the capital, as in a well-known leading case, *temp.* Eliz.:

> "Is your gold and silver ewes and rams?
> I cannot tell: I make it breed as fast."

Interest on legacies and devises.

The following rules are abridged from Theobald on Wills, 5th ed. p. 158 *et seq.*, the accuracy of which was commended by the C. A. in *In re Woodin* ([1895] 2 Ch. 309). Children exclude illegitimate children, as to whom see *In re Du Bochet* ([1901] 2 Ch. 441); personalty includes chattels real; conversion does not apply; there is no difference between specific and residuary realty.

Gifts by will carry interest from testator's death in the absence of directions to the contrary in case of:

(1) A present devise; *secus* a future devise; but see (4).

(2) A vested specific bequest; *secus* a contingent specific bequest; but see (3), (8), (9).

(3) A segregated contingent specific bequest: *In re Clements* ([1894] 1 Ch. 665); *In re Woodin* ([1895] 2 Ch. 309), distinguishing *Guthrie* v. *Walrond* (*supra*) and disapproving *Furneaux* v. *Rucker* (*supra*) Segregations must be by order of the testator: appointment is an order to segregate: *Long* v. *Ovenden* (16 Ch. D. 691).

(4) Contingent residuary personalty, and future residuary personalty and realty blended in one gift to the same beneficiaries: *In re Burton's Will* ([1892] 2 Ch. 38); *In re Holford*, etc.

And any immediate legacy (5) charged on land only.

(6) Where the legatee is an infant, and (i.) maintenance is given, or (ii.) the testator is *in loco parentis.*

(7) Where the legacy is in satisfaction of a debt (dower and jointure are not debts).

And any legacy payable on a contingency or at a certain date (8) if testator survives that date or contingency.

(9) In the same cases as (6 (i.)), (6 (ii.)); but "directions to the contrary," which are discussed in *In re Moody* ([1895] 1 Ch. 101), probably include the setting apart of another fund for maintenance.

The rate of interest is 4 per cent. See p. 158.

The following rules as to how and when the class is ascertained are also abridged from Theobald on Wills, 5th ed. p. 277, *et seq.*

Rules for ascertaining members of a class who take.

I. As to Personalty. A. gives to B.'s children:—

(1) Only those of B.'s children who are alive at A.'s death take; in default of such children, all B.'s children take. Ditto in gifts of income, *In re Powell* ([1898] 1 Ch. 227).

(2) After B.'s death: only B.'s children born and living at A.'s and born before B.'s death take; in default, etc., as in (1).

(3) To be paid at twenty-one or to such as attain twenty-one: only B.'s children attaining twenty-one before A.'s death take; in default of such children [all born and living at A.'s death and coming into

existence before B.'s eldest child attains twenty-one take; in default of such children] all B.'s children take on attaining twenty-one [probably]. In gifts of income, omit portion in square brackets: *In re Wenmoth's E.* (37 Ch. D. 266), cited in *In re Powell.*

(4) A. gives to B. for life, then to B.'s children, to be paid at twenty-one, or to such as attain twenty-one; only B.'s children born and living at A.'s death and born [before B.'s death, or before B.'s eldest child attains twenty-one (whichever happens last)] take. *In re Knapp's S.* ([1895] 1 Ch. 91), citing *In re Emmet's E.* (13 Ch. D. 484) and applying these rules to deeds. But in gifts of income omit portion in square brackets and write "thereafter:" *In re Wenmoth's E.*

II. As to Realty.

(1) A. gives to B.'s children: only those alive at A.'s death take, unless it is an executory devise, in which case all will take.

(2) A. gives to E. for life, etc., then to B.'s children, who attain twenty-one: the gift, if a contingent remainder fails as to all B.'s children who are not in existence before E. dies, etc.; if an executory devise, all B.'s children will take: *Dean* v. *D.* ([1891] 3 Ch. 150); *Blackman* v. *Fysh* ([1892] 3 Ch. 209); *Symes* v. *S.* ([1896] 1 Ch. 272).

But a disposition contained in an instrument made or republished after 2nd of August, 1877, which fails because it is expressed to be a contingent remainder, will take effect as an executory limitation if it can so take effect (40 & 41 Vict. c. 33).

It is still questionable as to how the class will be ascertained which takes under a limitation expressed to take effect as a contingent remainder, but taking effect (under this Act) as an executory limitation. See Davidson's Concise Precedents, 16th ed. p. 661 n. b.

Apportionment Act.

Since the *Apportionment Act*, 1870, periodical payments accrue from day to day. But see *Bulkeley* v. *Stephens* ([1896] 2 Ch. 241).

A child "in existence."

A child *en ventre sa mère* is in existence: *In re Burrows* ([1895] 2 Ch. 497).

Other contingencies.

In the above examples children are the only class, and "aged twenty-one" is the only contingency or date of payment mentioned. The same principles apply *mutatis mutandis* where other classes, dates, or contingencies are mentioned. Thus in *In re Moss* ([1899] 2 Ch. 314) the class was "B.'s children and E.;" in *In re Pickworth* ([1899] 1 Ch. 642) the contingency was survivorship between two children; and a common date is twenty-five years of age. But it should be observed that sect. 43 of the *C. A.*, 1881, does not apply if vesting is postponed beyond twenty-one years: *In re Judkin's T.* (25 Ch. D. 743); and in these cases the rule against perpetuities is a constant rock of offence: for its infringement vitiates the whole gift unless any part of it is clearly severable.

Rule against perpetuities.

Of course if the gift vests at birth, and is only liable to be divested at twenty-five, *In re Turney* ([1899] 2 Ch. 739), the gift takes effect. Again, a gift to an unborn person (E.) for life or a less interest, and subject thereto to B., B. and E. being persons not born out of the due season, takes effect both as to B. and E.: *Wainwright* v. *Miller* ([1897] 2 Ch. 255); but see *In re Gage* ([1898] 1 Ch. 498). The law as to severing gifts or conditions is illustrated on pp. 261, 354, and may also be illustrated thus. A gift to B. for life, then to his children for life, then to their children, is severable; and the children of the children, who were born in settlor's life, take: the children of the other children do not take. The total gift splits into different shares, and the invalidity which affects one share does not affect the other: *In re Russell* ([1895] 2 Ch. 698). In *In re Wise* ([1896] 1 Ch. 281), and *In re Watson* ([1892] W. N. 192), the gift of capital was condemned, and of maintenance upheld. But a gift to a remote class as tenants in common with B. wholly fails: *In re Mervin* ([1891] 3 Ch. 197); *In re Stevens* ([1896] W. N. 24). Nor can one gift over in default of such children be construed as two gifts over in default (1) of children, (2) and of such children: *In re Bence* ([1891] 3 Ch. 242); *In re Hancock* ([1901] 1 Ch. 482), distinguishing *Evers* v. *Challis* (7 H. L. C. 531). See *ante*, p. 45.

Laws against accumulation.

The laws which forbid accumulations of interest, rent, etc., beyond (1) the life of the donor, or (2) twenty-one years from his death, or during the minority of a child (3) in being at his death or (4) who would, if of full age, be entitled to the interest, rents, etc. (39 & 40 Geo. III. c. 98; 55 & 56 Vict. c. 58), are also a stumbling-block. Accumulations which are to be invested wholly, not mainly, *In re Danson* ([1895] W. N. 102), in land or real estate, *In re Clutterbuck* ([1901] 2 Ch. 285), are only authorized during the fourth period. Accumulations for payment of debts, for portions for settlor's or beneficiaries' children, of proceeds of timber, and for repairs, *Vine* v. *Raleigh* ([1891] 2 Ch. 13); *In re Mason* ([1891] 3 Ch. 467), or replacement of wasting capital, *In re Gardiner* ([1901] 1 Ch. 697), are excepted from these prohibitions. These laws are less stringent than the rule against perpetuities, and only avoid the accumulations *pro tanto*. See *ante*, p. 52.

Family Arrangements.

WILLIAMS *v.* WILLIAMS.

(L. R. 2 Ch. 294.)

A family arrangement may be upheld although there were no rights in dispute at the time of making it, and the Court will not be disposed to scan with much nicety the quantum of the consideration. Principle.

A tanner who owned real estate of socage, gavelkind, borough English and leasehold tenure, and stock-in-trade, etc., died in 1831, leaving a wife and two sons, John and Samuel. After his death an unwitnessed will was found, by which he purported to give all his property (subject to provision for his widow) to his two sons equally. The intended will was refused probate. At an interview shortly after the refusal, John declared that the invalidity of the will should make no difference, but that the property should "be not mine nor thine, but ours." The widow stated that she did not claim her right to dower because her sons were carrying out their father's intentions, and for the rest of her life she was supported by her two sons out of the proceeds of the tannery, which the brothers carried on as partners until 1851, and out of the income of their father's estate. The two brothers treated the whole property as belonging to them equally. In 1858 Samuel died, and on a suit being instituted by his representatives, the C. A. held that there was sufficient evidence of a family arrangement, and that John and Samuel were tenants in common of their father's property. Summary of facts.

"There was here no doubtful right to be compromised, no dispute between the brothers which was to be set at rest, no honour of the Family arrangements include compromises and re-settlements.

family involved; the appellant was merely prompted by respect for his father's intentions, and by his affection for his brother. . . . It was strongly argued for the appellant that this case does not fall within the range of those authorities, that those cases extend no further than to arrangements for the settlement of doubtful or disputed rights, and that in this case there was not and could not be any doubtful or disputed right; but this, I think, is a very short-sighted view of the cases as to family arrangements. They extend, as I apprehend, much further than is contended for on the part of the appellant, and apply, not merely to cases in which arrangements are made between members of a family for the preservation of its peace, but to cases in which arrangements are made between them for the preservation of its property. The re-settlement of family estates upon an arrangement between the father and the eldest son on his attaining twenty-one, may well be considered as a branch of the cases, and certainly this Court does not in such cases inquire into the *quantum* of consideration:" per Lord Chelmsford, L.C. He added that if there had been no consideration whatever, the arrangement would in all probability not have been treated as binding on the parties, but then there was some consideration to support the arrangement in the circumstances of the case. The borough English property which Samuel had brought into the common stock was of some, though of trifling value. Another fact to be taken into account was that the widow was a party to the arrangement, and had relinquished her freebench and dower and right to one-third of the personalty in order to carry it into effect.

Consideration must be present.

Quantum of consideration and specific performance.

A family arrangement is not by itself valuable consideration; if without value it is void against creditors; *secus* if for value: see p. 55.

Equity will not grant specific performance of a contract not for value, and a contract to enter into a family arrangement is no exception to this rule. In former times it looked at the *quantum* of consideration; and consequently the existence of a family arrangement would be a material addition to a slender consideration such as that which existed in the l.c. But modern equity will not weigh consideration "in golden scales;" and, as Lord Eldon said, will only refuse specific performance where the inadequacy of price amounts in itself to conclusive and decisive evidence of fraud: *Coles* v. *Trecothick* (9 Ves. 246); and in such cases the Court also sets aside deeds. (See Fry, Sp. P., pt. iii. ch. 7.) The two following dicta which occur in judgments after Lord Eldon's time seem to indicate that the Court will look to the *quantum* of consideration where the contract is not to effect a family arrangement:—

"From the case of *Stapilton* v. *S.* (1 W. & T. 223)*," said Sugden, L.C., in *Westby* v. *W.* (2 Dr. & War. 502, 525), "down to the present day, the current of authorities has been uniform, and wherever doubts and disputes have arisen with regard to the rights of different members of the said family (and especially, I may observe, where those doubts have related to a question of legitimacy), and fair compromises have been entered into to preserve the harmony and affection, or to save the honour of the family, those arrangements have been sustained by this Court, albeit, perhaps, resting upon grounds which would not have been considered satisfactory, if the transaction had occurred between mere strangers." And Lord Cottenham said in *Persse* v. *P.* (7 Cl. & F. 318), "By what scale of money consideration are these objects to be estimated? The impossibility of estimating them has led to the exemption of family arrangements from the rules which affect others. The consideration in this and in the other such cases is compounded partly of value and partly of love and affection." But the cases do not bear out the dicta: *Falcke* v. *Gray* (4 Drew. 651) (the old china case) does; but it is questioned by Fry (Sp. P., 3rd ed. p. 208).

Compromises import value.

In most of the older cases, as in *Stapilton* v. *S.*, *Westby* v. *W.*, *Persse* v. *P.*, *Stewart* v. *S.* (6 Cl. & F. 911), a doubtful claim was compromised; and having regard to the current of modern authority it seems difficult to see why any other evidence of valuable consideration was required.

A *bonâ fide* compromise of a doubtful claim is nowadays regarded both in equity and at law as valuable consideration; and none the less so because one of the parties has no claim: *Callisher* v. *Bischoffsheim* (L. R. 5 Q. B. 449), approved in *Miles* v. *New Zealand Co.* (32 Ch. D. 266). *Lansdown* v. *L.* (Mos. 364) cannot be considered law. See *Stewart* v. *S.*† at pp. 965, *et seq.* Each party must believe in his own claim: *Dixon* v. *Evans* (L. R. 2 H. L. 618, 619); *Reynell* v. *Sprye* (8 Ha. 222), otherwise the compromise is not *bonâ fide*, *ex p. Banner* (17 Ch. D. 480). A narrow but easily distinguishable line separates some of these cases from those of mistake of law and fact grouped respectively around *Rogers* v. *Ingham* and *Cooper* v. *Phibbs*, in which the intention of the parties was to assert, not to abate, their mutual rights. Where there is an intention to compromise claims in which each claimant believes, a contract to compromise binds like any other contract for value. Instances of such compromises are given on p. 95 (27), (28).

Counsel's authority to compromise.

Counsel may compromise his client's claim in Court, unless forbidden, *Swinfen* v. *S.* (18 C. B. 485); *Matthews* v. *Munster* (20 Q. B. D. 141), so may solicitor: per Chitty, L.J., in *Macaulay* v. *Polley* ([1897] 2 Q. B. 122); but neither may before action unless authorised, *ib.*, *Harvey* v. *Croydon R.S.A.* (26 Ch. D. 249)†. Such compromise must not extend beyond the subject-matter of litigation: *Kempshall* v. *Holland* (14 R. 336), discussed 98 L. T. 489. And for procedure, where counsel consents, see *Hickman* v. *Berens* ([1895] 2 Ch. 638). The Court cannot force a compromise on infants against the opinion of their legal advisers: *In re Birchall* (16 Ch. D. 43). Parties themselves must not compromise an action in such a way as to defeat solicitor's lien: *In re Margetson & Jones* ([1897] 2 Ch. 314); *White* v. *Pearce* (7 Ha. 276). See *post*, p. 226, 392.

Conceal-

Like any other contract, the compromise can be set aside on grounds ment of material facts vitiates compromises.

of mistake: *Hickman* v. *Berens* (*supra*). The principles are the same. *Neale* v. *N.* (1 Ke. 672) apparently contradicts *Cooper* v. *Phibbs*, *ante*, p. 90, but only apparently, because the parties probably meant to compromise their title however and whencesoever it arose. *Lawton* v. *Campion* (18 B. 87) is a family arrangement on all fours with *Cooper* v. *Phibbs*. The only difference in the case of compromises is that being contracts *uberrimæ fidei*, per Lord Westbury, *Tennent* v. *Tennents* (L. R. 2 H. L. Sc. 6, 10), they will be set aside unless there is full disclosure of everything material. "To make a compromise of any value the parties must be at arm's length, on equal terms, with equal knowledge, and with sufficient advice and protection:" per James, L.J., *Moxon* v. *Payne* (8 Ch. 881). Answers ought to be made where questions are not asked: *Greenwood* v. *G.* (2 D. J. & S. 28, 42). One side must not know more about the matter than the other, *Leonard* v. *L.* (2 Ba. & Be. 171); *Gilbert* v. *Endean* (9 Ch. D. 259), unless what he knows could not possibly have affected the other party's decision: *Maynard* v. *Eaton* (9 Ch. 414). In *Gordon* v. *G.* (3 Sw. 400) an agreement between two brothers for the division of the family property was set aside after nineteen years, on the ground that the younger brother knew that there had been a ceremony which was called a private marriage and concealed this knowledge, and Lord Eldon said that whether he did so designedly "or in an honest opinion of the invalidity of the ceremony and of a want of obligation on his part to make the communication, the Court could not sanction the arrangement." In *Fane* v. *F.* (20 Eq. 698) an innocent misrepresentation as to title by the father and his solicitor (who was also the son's solicitor) induced the son to make the family arrangement; on the misrepresentation being discovered by the son, the deed of settlement was at his instance set aside. Compare *Smith* v. *Pincombe* (3 Mac. & G. 653).

Practice.

Similar principles apply to any other compromise. An application to set aside an agreement for the compromise of an action cannot be made by summons in an action, but a fresh action must be brought: *Gilbert* v. *Endean* (*ubi supra*). *Ante*, p. 95 (23).

Resettlements and mortgages;

and presumptive undue influence;

Apparent mortgages have been treated as real conditional sales in family arrangements, where but for the family arrangement a different construction might have been adopted. Two cases are cited, *post*, p. 267. There are two other classes of cases with regard to which family arrangements stand in a peculiar position. The Court has held a father's dealings with a child who has just come of age open to *primâ facie* suspicion of undue influence; and dealings with reversioners are similarly suspected, *ante*, pp. 70, 81. There are three sub-classes of cases on this point: (*a*) Resettlements if voluntary must not confer gifts on the father unless the son has independent advice (pp. 74 (10), 82). All the presumptions of undue influence and reversionary extension will apply. (*b*) In resettlements for value where the father is not benefited, the father is looked on as the natural guardian and protector of his son's interests, as in *O'Rorke* v.

Bolingbroke (2 A. C. 814). Thus in *Baker* v. *Bradley* (7 De G. M. & G. 597, 620), Turner, L.J., declared that the Court views resettlements for value with favour, and only voluntary resettlements with jealousy. In such cases the presumption of undue influence, etc., is not only rebutted but reversed, and the Court praises the use of parental influence: *Jenner* v. *J.* (2 D. F. & J. 359); *Hartopp* v. *H.* (21 B. 259); *Fane* v. *F.* (20 Eq. 698). (*c*) In cases of resettlements for value where the father receives benefits, "the Court will not view transactions between father and son in the light of reversionary bargains, but will regard them as family arrangements with a reasonable degree of jealousy:" per Lord Eldon: *Tweddell* v. *T.* (1 Tur. 1). (*c*) cases partake of (*a*) and (*b*). As in (*b*) the Court asserts that the father is the best adviser the child could have, independent advice is not wanted; as in (*a*), if "there is a disposition of the child's property for the benefit of the father," independent advice is necessary: *Tucker* v. *Bennett* (38 Ch. D. 1). Usual or reasonable benefits to the father, *Tweddell* v. *T.*; *Stewart* v. *S.*; *Dimsdale* v. *D.* (3 Dr. 556), unusual clauses not benefiting the father, *Jenner* v. *J.*; *Hoblyn* v. *H.* (41 Ch. D. 200), are valid without independent advice; but unusual benefits to the father will bar specific performance, *Playford* v. *P.* (4 Ha. 546), vitiate the deed, *Dimsdale* v. *D.*, or be expunged: *Hoblyn* v. *H.* Only usual provisions should be inserted; as to which see Blythewood and Jarman's Conveyancing, 4th ed. vol. vi. 381. See, too, *Cooper* v. *C.* (5 Ch. 203), etc., and other cases cited, *post*, p. 186 (40).

Execution of powers and resettlement.

Again, resettlements by way of family arrangement are said to justify the execution of a power by a donee who retains some benefit thereunder. But for the fact of a resettlement such execution would be a fraud on the power, and therefore void. See *post*, pp. 185, 186. The only case, however, which bears out this proposition is *Davis* v. *Uphill* (1 Sw. 129), where Lord Eldon said:—"I have not met with any case where, in an arrangement settling the interests of all the branches of a family, it has been held that children may not contract with each other to give to a parent who had a power to distribute property among them some advantage which the parent without their contract with each other could not have." The case, however, was one where the parent gave up some estates, in return for which her other estates for life were enlarged so as to be *sans* waste; that is to say, value was given for the only advantage secured; and it may be doubtful how far the deed of resettlement contained any execution of a power. Perhaps the execution of a power of appointing to children by appointing to a child under an agreement to resettle on his or her marriage, is valid owing to the favour with which the Court views family arrangements. See Farwell on Powers, 2nd ed. p. 421.

Death duties, etc.

A family arrangement involving transfers and extinguishments of estates and mortgages is a conveyance on sale within the meaning of the Stamp Act, 1891, ss. 54, 57; *M. of Bristol* v. *C.I.R.* ([1901] 2 K. B. 336).

A family arrangement, if a purchase for money or money's worth, exempts an estate from succession duty and estate duty under the Finance Act, 1894, s. 3: *Lord-Adv.* v. *Fife* (11 Sc. S. Ca., 4th ser. 222); Hanson, ed. 4, pp. 119, 551; contrast *A.-G.* v. *Hawkins* ([1901] 1 Q. B. 285); *Brown* v. *A.-G.* (79 L. T. 572); *A.-G.* v. *Dobree* ([1900] 1 Q. B. 442).

The Married Women's Property Act, 1882.

REID *v.* REID.

(31 Ch. D. 402.)

Principle.

Sect. 5 *of the M. W. P. Act*, 1882, *is limited to property the title of which accrues since the* 1st *January*, 1883, *and accordingly when a woman married before* 1st *January*, 1883, *has acquired a title to property whether vested or contingent, and whether in remainder or reversion before that date, such property does not become separate property by falling into possession after that date.*

Summary of facts.

A woman married in 1871 was entitled under a settlement made in 1874 to a reversionary interest in the proceeds of the sale of certain real estate, and on the death of the tenant for life in February, 1883, she brought an action asking for a declaration under the *M. W. P. Act*, 1882, that she was entitled for her separate use to her interest under the deed of 1874, or in the alternative that the whole of such share might be settled on her or her children.

The C. A. decided that she was not entitled to the declaration that the property in question was her separate property, but remitted the question as to her equity to a settlement to be dealt with by the judge from whom the appeal was brought.

Sects. 2 and 5 of this Act.

The *M. W. P. Act*, 1882, extends the incidents of property settled to her separate use to all property of women married after the Act (sect. 2), and to all property acquired after the Act (sect. 5). These two sections are supplemented by sect. 1 of the Act (as amended by the Act of 1893), which defines her rights of disposition and contract; and by sect. 12 which gives her the same civil remedies against all persons (including her husband) as a *feme sole*. The rest of the Act enters into minuter details as to special forms of property, assurance, liability, crimes, and procedure. Sects. 1 and 12 and the rest of the Act group themselves either around sect. 2 or around sect. 5. These two sections are the two central pivots, the two *foci* of the Act. See Note.

Argument on sect. 5.

The l.c. settled the construction of sect. 5, which had given rise to "a most singular variety of judicial opinions" (pp. 404, 405). It was contended that there might be five kinds of accruer of title, either vested, contingent, in possession, in reversion, or in remainder, and that if any one of them happened after 1st January, 1883, the property was to be treated as separate property. The C. A., however, decided that one title only was dealt with, and that the words were introduced to preclude an argument which might otherwise have been raised—that the accruer of the title in reversion or contingency was not an accruer of title within the meaning of the Act. Or perhaps the words may have been introduced in order to exclude interests in expectancy. Thus a "*spes successionis*" is "property in expectancy" within the meaning of the *Infants S. Act*, 1855, *In re Johnson* ([1891] 3 Ch. 48), and although insufficient to support an action, *Molyneux* v. *Fletcher* ([1898] 1 Q. B. 636, 648), it is assignable in equity: *In re Clarke* (36 Ch. D. 348); *Tailby* v. *Off. Rec.* (13 A. C. 523, 543); but it is not a "reversionary interest" within Malin's Act, 1857, nor an "estate" within sect. 77 of the Fines and Recoveries Act, 1833, *Allcard* v. *Walker* ([1896] 2 Ch. 369), nor a "contingent title" within the meaning of this Act; and therefore a will which took effect in 1879, and which bequeathed personalty to trustees upon trusts which failed in 1886, and subject thereto upon trust for such persons as would have been testator's next of kin had he then died intestate, was only regarded as conferring upon such next of kin a "*spes successionis*" between 1879 and 1886, so that their "title" only accrued at the last-mentioned date: *In re Parsons* (45 Ch. 51).

(*spes successionis.*)

Principle of construction of sect. 5.

In coming to this conclusion in the l. c. the C. A. recognized the principle, "*omnis nova constitutio futuris formam imponere debet non prœteritis*," *i.e.* that a statute ought to be construed so as to interfere as little as possible with vested rights; and that if the words of a statute are ambiguous, the construction which leads to less inconvenience ought to be adopted. Little assistance could be derived from cases decided on covenants with regard to after-acquired property contained in marriage settlements. Such cases "must be approached with the presumption that the object and intention of the settlement is to prevent the husband acquiring property of the wife which falls into possession during the coverture:" *In re*

Clinton's T. (13 Eq. 295, 305). Sect. 5 of the Act being to some extent retrospective, there is "no presumption that it is not intended to be confined to property in which the husband at the commencement of the Act had not any interest."

Of sect. 19.

The clause saving vested interests, sect. 19, did not apply to this case. On the other hand, it is so worded as to create new vested interests. Thus it enacts that future as well as past settlements and agreements for settlements must be construed as though neither sect. 2 nor sect. 5 existed. If therefore the wife is an infant, and she and her husband settle her property, her repudiation, when of age, is invalid, because the settlement takes effect as the husband's settlement: *Stevens* v. *Trevor-Garrick* ([1893] 2 Ch. 307); *Buckland* v. *B.* ([1900] 2 Ch. 534), following *Hancock* v. *H.* (38 Ch. D. 78). A covenant to settle property, except property given to her for her separate use, includes property coming to her after 1882: *ib.*, *In re Whitaker* (34 Ch. D. 227); *In re Stonor's T.* (24 Ch. D. 195). The ultimate consequences of these decisions was pointed out by Chitty, J., in *In re Queade's T.* (54 L. J. Ch. 786). The immediate consequence is that husbands must be parties to their wives' settlements and agreements to settle future property, as to which see *In re Haden* ([1898] 2 Ch. 220), and that express limitations to the separate use of a woman still have a meaning (Key & Elph. Prec. ii. 466 *n.*).

Other cases on date of title, etc.

See also as to commencement of Act, *Weldon* v. *Winslow* (13 Q. B. D. 784), *Lowe* v. *Fox* (15 Q. B. D. 667, 12 A. C. 206) (tort); *Gloucestershire Banking Co.* v. *Phillipps* (12 Q. B. D. 533); *Conolan* v. *Leyland* (27 Ch. D. 632) (contract); *In re Bowen* ([1892] 2 Ch. 291); *In re Wylie* ([1895] 2 Ch. 116) (will).

It would seem then that the only spirit which case-law has read into the Acts is that vested interests must be guarded with jealousy.

General effects.

The following are the most important but not the most obvious consequences produced by this Statute upon the rights of property and upon the status of women married after January 1st, 1883, or subject to the new law under sect. 5:—

New liabilities, rights of property and action.

"The right of action is the same as against a man, but the relief is different:" *per* Fry, L.J., *Whittaker* v. *Kershaw* (45 Ch. D. 320, 329; cited [1891] 1 Q. B. 783). Under sect. 4 property over which she has and executes a general power of appointment is subject to her debts, though such power is to appoint by will only: *In re Parkin* ([1892] 3 Ch. 510); *In re Ann* ([1894] 1 Ch. 549); *In re Hodgson* ([1899] 1 Ch. 666). Compare *In re Hughes* ([1898] 1 Ch. 529), a case under sect. 4, and the *Matrimonial Causes Act*, 1857, ss. 25, 26. Cases before the Act went on the same lines, but were not quite consistent; see *The London Chartered Bank of Australia* v. *Lemprière* (L. R. 4 P. C. 572); *In re Harvey's E.* (13 Ch. D. 216); *Hodges* v. *H.* (20 Ch. D. 749). She can release a power coupled with an interest to her separate use, *In re Davenport* [(1895] 1 Ch. 361), although restrained from anticipation: *In re Chisholm's S.* ([1901] 2 Ch. 82). She can enlarge a base fee without acknowledgment, and without her husband's assent: *In re Drummond and Davie's C.* ([1891] 1 Ch. 524). She can sign an administration bond alone: *In re Ayres* (8 P. D. 168). She can be attached for non-compliance with an order to pay into Court money in her possession belonging to an estate which she is administering: *In re Turnbull* ([1900] 1 Ch. 180). Her acceptance of the office of executrix, trustee, etc., is as free as are contracts by her, and involves the same liabilities: sect. 24. Separate examination is no longer necessary under sect. 59 of the *S. E. Act*, 1877, if the woman was married after 1882, *In re Harris' S. E.* (28 Ch. D. 171); *Riddell* v. *Errington* (26 Ch. D. 220), or became entitled after 1882, *In re Batt's S. E.* ([1897] 2 Ch. 65); contrast *In re Arabin's T.* ([1885] W. N. 90). As mortgagee she can convey realty acquired after the Act without acknowledgment and without her husband, *In re Brooke & Fremlin's C.* ([1898] 1 Ch. 647). Cases of fraud on marital rights and equities to a settlement are obsolete.

Joint-tenant, etc

"The effect of marriage on particular property in which a woman has an interest as joint-tenant depends on whether the marriage divests the property from the wife and vests it in the husband:" therefore marriage will not now sever a joint tenancy, *In re Butler's T.* (38 Ch. D. 286, 294)†; *Palmer* v. *Rich* ([1897] 1 Ch. 134)†, nor will a lease by the husband and the co-tenant, *ib.* In *In re March* (27 Ch. D. 166) a testatrix who died after 1883, by her will executed before 1883, gave her property to A. and B., and his wife, "to and for their own use and benefit." The will was construed in accordance with the old law; A. took half, B. took a quarter, and his wife took the other quarter. "In my opinion," said Cotton, L.J., "the Act was not intended to alter any rights excepting those of the husband and wife *inter se.* What the effect will be when words similar to these occur in a will made after the Act came into operation, I do not say." A conveyance after 1883 to the use of her and her husband makes her and her husband joint-tenants: *Thornley* v. *T.* ([1893] 2 Ch. 229). A gift by will to A., her husband, and her, will make three joint-tenants, *In re Dixon* (42 Ch. D. 306)†, and the whole will be divisible into thirds, *ib.*, or halves, if there is an "and" between A. and her husband: *ib.*, citing *In re Jupp* (39 Ch. D. 148), etc. Compare *In re Gue* ([1892] W. N. 132) (gift by will to tenants in common), and *post*, p. 300.

Bankruptcy law.

She can be made bankrupt, and her property will vest in her trustee in bankruptcy, *Ex p. Boyd* (21 Q. B. D. 264), if she carries on a trade separately from her husband, or has debts incurred in such business: *In re Worsley* ([1901] 1 Q. B. 309), approving *In re Dagnall* ([1896] 2 Q. B. 407). Property restrained from anticipation will also vest as soon as the restraint ceases: *In re Wheeler's S. T.* ([1899] 2 Ch. 717). See sect. 1 (5).

If she lends money to her husband for his trade or business, she can prove only after other creditors are satisfied (sect. 3). The purpose of the loan must be proved by the trustee in bankruptcy: *Ex p. Cronmire*

([1901] 1 Q. B. 480), dissenting from *In re Genese* (16 Q. B. D. 700). This does not affect her rights of retainer as administratrix, *In re May* (45 Ch. D. 499); *In re Gilbert* ([1898] 1 Q. B. 282), although rights in administration actions are the same as in bankruptcy: *In re Leng* ([1895] 1 Ch. 652). Compare *In re Heywood* ([1897] 2 Ch. 593); *In re Whitaker* ([1901] 1 Ch. 9). She can prove for such loans like any other creditor against joint assets where the husband is a partner: *Ex p. Nottingham* (19 Q. B. D. 88). In other loans she proves on an equality with other creditors: *Mackintosh* v. *Pagose* ([1895] 1 Ch. 505); *Ex p. Schulze* ([1898] 2 Q. B. 330), approving *Ex p. Tidswell* (56 L. J. (Q. B.) 548). Compare *In re Dixon* ([1900] 2 Ch. 561) (constructive payment of interest).

Action.

She is liable on joint contracts like other joint contractors, *Hoare* v. *Niblett* ([1891] 1 Q. B. 781); may sue as co-plaintiff with her husband for damages, *Beasley* v. *Roney* ([1891] 1 Q. B. 509), and although without separate property she can obtain an interlocutory injunction: *Pike* v. *Cave* ([1893] W. N. 91). A husband can bring an action against his wife for money lent by him to her or paid by him for her after marriage: *Butler* v. *B.* (16 Q. B. D. 374). Debts between husband and wife are subject to the Statutes of Limitations by analogy: *In re Lady Hastings* (35 Ch. D. 94). Her property is subject to innkeeper's lien: *Gordon* v. *Silber* (25 Q. B. D. 491). As legatee she is liable to refund money paid by the executors in respect of her share: *Whittaker* v. *Kershaw* (45 Ch. D. 320). A garnishee summons will issue against her credit: *Holtby* v. *Hodgson* (24 Q. B. D. 103).

Ante-nuptial debts.

The law with regard to the husband's liability for his wife's ante-nuptial debts was summed up by Lindley, L.J., in *Beck* v. *Pierce* (23 Q. B. D. 316), as follows:—"The *M. W. P. Act*, 1882, has entirely altered the law as regards the liabilities of husbands for their wives' ante-nuptial debts. First, he can now be sued without her, and whether she be alive or dead. Secondly, he can be sued with her under sect. 15, if the plaintiff seeks to establish his claim wholly or in part against both husband and wife; but in this case the judgments may be separate, although to the extent to which they are both liable, the judgment may be 'a joint judgment against the husband personally, and against the wife as to her separate property.' What the word 'joint' means in this sentence is not clear. Thirdly, the husband's liability is no longer unlimited as at Common Law; it is limited to the value of his wife's property which he may have acquired (see sect. 14). Fourthly, as between him and her he is entitled to be indemnified out of her separate property (see sect. 13)." See also references to ante-nuptial debts in the notes to the next l.c. As to the former law see *ib.*, *In re Parkin* ([1892] 3 Ch. 510), and *Robinson* v. *Lynes* ([1894] 2 Q. B. 577).

Doubtful points.

If she carries on a trade jointly with her husband, or does not trade, it is doubtful whether she can be made bankrupt. It is doubtful whether she can disclaim a power not coupled with an interest. It is doubtful whether a gift of paraphernal articles by husband to wife will be construed as an out and out gift: *In re Vansittart* ([1893] 1 Q. B. 181), or as a gift of paraphernalia in the old sense: *Tasker* v. *Tasker* ([1895] P. 1). See as to other gifts, *Ramsay* v. *Margrett* ([1894] 2 Q. B. 18) (furniture, etc.); *Paget* v. *P.* ([1898] 1 Ch. 470, 474–477) (charge to pay husband's debts). Compare *In re Tankard*, *ante*, p. 58; *Ex p. Cronmire* ([1894] 2 Q. B. 246).

No change.

As judgment is against her separate property and not against her, *Scott* v. *Morley* (20 Q. B. D. 120), applying *Hulme* v. *Tenant* (1 W. & T. 654)*, property over which she has a general power of appointment, which she has not exercised, cannot be made subject to her debts in bankruptcy: *Ex p. Gilchrist* (17 Q. B. D. 521). For the same reason she cannot be made bankrupt under sect. 4 (1) (*g*) of the *Bankruptcy Act*, 1883: *Ex p. Lester* ([1893] 2 Q. B. 113); *Ex p. Levene* ([1895] 1 Q. B. 328); *Ex p. Frances Handford* ([1899] 1 Q. B. 566). Marriage will save her from the effects of an act of bankruptcy committed when single: *Ex p. a Debtor* ([1898] 2 Q. B. 576). Property restrained from anticipation cannot, after the restraint ceases, be attached under a garnishee order for debts incurred during coverture: *Barnett* v. *Howard* ([1900] 2 Q. B. 784); *post*, p. 124. She cannot be attached for non-compliance with an order to make good a devastavit, *In re Turnbull* ([1900] 1 Ch. 180), nor for postnuptial debts under sect. 5 of the *Debtors' Act*, 1869: *Scott* v. *Morley* (20 Q. B. D. 120); *Softlaw* v. *Welch* ([1899] 2 Q. B. 419). She cannot make a gift by will when restrained from doing so by any statute: *In re Smith's E.* (35 Ch. D. 589). She cannot be a next friend or guardian *ad litem*: *In re Duke of Somerset* (34 Ch. D. 465). If trustee or executrix she cannot be made bankrupt or attached for non-payment of a debt as we have seen: see *In re Turnbull* (*supra*); the order in such cases being based on that in *Scott* v. *Morley* (*supra*); and she cannot convey real estate without her husband or without acknowledgment, *In re Harkness & Allsopp's C.* ([1896] 2 Ch. 358), her competency in disposing of property being limited to the matters comprised in sect. 18.

Her inability to assign a "*spes successionis*," or to take out of settlement property of hers settled by her husband, has been discussed, *ante*, p. 115.

Husband's rights and liabilities.

In spite of the words "*feme sole*" (sect. 1 (1)), the husband is still tenant by curtesy of his deceased wife's realty, *Hope* v. *H.* ([1892] 2 Ch. 336), and still takes her personalty, and is liable to that extent for her debts if she dies intestate: *In re Lambert's E.* (39 Ch. D. 626); *Surman* v. *Wharton* ([1891] 1 Q. B. 491). Her husband can be sued for torts committed by her, *Seroka* v. *Kattenburg* (17 Q. B. D. 177), *Earle* v. *Kingscote* ([1900] 2 Ch. 585), even when separated from her: *Utley* v. *Mitre Publishing Co.* (17 T. L. R. 720).

II. Jurisdiction.

II. The *M. W. P. Act*, 1870 (33 & 34 Vict. c. 93), specifically assigned to the Court of Chancery or County Court the business of deciding all questions as to property declared by the Act to be separate property of the wife and as to the appointment of trustees of policies of assurance. That Act has been repealed (subject to a saving clause) by sect. 22 of the *M. W. P. Act*, 1882, sect. 17 of which enables any judge of the High Court of Justice or County Court to determine all questions between husband and wife as to the title to or possession of property; although the 11th section assigns the appointment of trustees of policy moneys to the Chancery Division, or (where the trust estate does not exceed £500) County Courts. See C. C. Annual Practice, i. 466; ii. 19.

NOTE.

The *M. W. P. Acts*, 1882, 1893.

The following are the principal sections of the *M. W. P. Act*, 1882, omitting the sections repealed by the Act of 1893,* and substituting the corresponding sections of that Act:—

General provisions as to property,

"Sect. 1 (1). A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee."

wills,

* "Sect. 3. Sect. 24 of the *Wills Act*, 1837, shall apply to the will of a married woman made during coverture, whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or republished after the death of her husband."

contracts and torts.

"Sect. 1 (2). A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in such action or proceeding shall be payable out of her separate property, and not otherwise."

* "1. Every contract hereafter entered into by a married woman otherwise than as agent (*a*) shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract; (*b*) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; (*c*) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to: Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating."

Sect. 2 provides that "every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill."

Property acquired by a woman married after the Act to be held by her as a *feme sole.*

Sect. 5 provides "that every woman married before the commencement of this Act (1st January, 1883) shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid."

Property acquired by a married woman after the Act to be held by her as a *feme sole.*

Sect. 12 confers upon a married woman the same civil remedies against all persons whomsoever, including her husband, for the protection and security of her separate property as if such property belonged to her as a *feme sole.* Similar rights are conferred in cases of torts and crimes affecting her property.

Remedies by and against married women.

Removal of Restraint on Anticipation.

In re WARREN'S SETTLEMENT.

(52 L. J. CH. 928.)

The Court has not, under sect. 39 *of the Conveyancing Act,* 1881, *a general power of removing the restraint upon anticipation, but only a power to make binding a particular disposition of property by a married woman if it be for her benefit.*

Principle.

Property had been settled upon trust to pay the income to the wife for life without power of anticipation, and then to the husband for life, then to their children, and in default of children for the husband absolutely. The parties had been married for twenty-eight years without

Summary of facts.

having any children, the wife was fifty years old, and there was medical evidence that it was almost impossible for her to have children. Both husband and wife were badly off. The C. A. declined to remove the restraint on anticipation.

Powers under *Conveyancing Act*, 1881, s. 39, contrasted with other powers.

The 39th section of the *C. Act*, 1881, provides that, "notwithstanding that a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property." This is a new power, and is in fact a legislative reversal of the principle laid down in the case of *Robinson* v. *Wheelwright* (6 D. M. & G. 535), where it was held that effect could not be given to a bequest to a married woman upon condition that she conveyed to certain persons property subject to a restraint on anticipation. The only powers similar to this are powers of removing restraint for the purpose of compromising a suit, *Wilton* v. *Hill* (25 L. J. Ch. 156), and of allowing a solicitor's expenses which are incurred in saving the fund, to be charged on it, *In re Keane* (12 Eq. 115), and of impounding it, *post*, pp. 179, 180, and of ordering costs to be enforced thereout, *M. W P. Act*, 1893, s. 2. This last section only applies where she claims, *Nunn* v. *Tyson* ([1901] 2 K. B. 487), or counterclaims, *Hollington* v. *Dear* ([1895] W. N. 35); *Hood Barrs* v. *Cathcart* ([1895] 1 Q. B. 873), or appeals as such, *Paget* v. *P.* ([1898] 1 Ch. 477), not where she is caveator, *Moran* v. *Place* ([1896] P. 214), or defendant, or appeals as such: *Hood Barrs* v. *Heriot* ([1897] A. C. 177), approving *Hood Barrs* v. *Cathcart* ([1894] 3 Ch. 376). And further the Probate and Divorce Division can remove restraint when the wife ceases to be a wife, *Michell* v. *M.* ([1891], P. 208), and there are children or a husband to be benefited, *Thompson* v. *T.* ([1896] P. 263); and in cases of judicial separation and protection orders the restraint can be removed with regard to property subsequently acquired: *Waite* v. *Morland* (38 Ch. D. 135); *Hill* v. *Cooper* ([1893] 2 Q. B. 85).

History of the doctrine of anticipation.

The history of the doctrine of restraint on anticipation attached to property belonging to a married woman for her separate use commences a little more than a century ago. In 1785 a post-nuptial settlement was made in pursuance of a decree of the Court of Chancery on the marriage of Miss Vernon, by which realty and personalty were vested in trustees upon trust during the wife's life, to pay the income to the wife's appointees, and in default thereof for her separate use. Then the wife joined the husband in incumbering her life interest, the incumbrancers enforced their security, and Lord Thurlow, who had made the decree directing the settlement, had to decide in their favour. The story is told by Lord Eldon in *Jones* v. *Harris* (9 Vesey, 493: "So in *Pybus* v. *Smith* (1 Ves. Jun. 189), the Court settled the property in order to protect it with all the anxious terms then known to conveyancers. In a day or two afterwards, while the wax was yet warm upon the deed, the creditors of the husband got a claim upon it by an informal instrument, and the same judge who had made such efforts to protect her was, upon authority, obliged to withdraw that protection. In a subsequent case, in which Lord Thurlow became a trustee, he inserted words" (and not by anticipation) "that he hoped would take the case out of Lord Hardwicke's doctrine." From the time when these words were inserted by Lord Thurlow, this has been the usual formulary, and the effect of it, for the purpose of excluding the power of disposition, has never been questioned. The words, however, though almost universally employed, are not absolutely indispensable, for if the intention to restrain anticipation can be clearly collected from the whole instrument, it is sufficient. Lewin, p. 923, collects the cases on words which are effectual or ineffectual for the purpose.

Its connection with separate use.

The restraint on anticipation stands or falls along with the expressed or statutory separate use, *Stogdon* v. *Lee* ([1891] 1 Q. B. 661); *Ex p. Hood Barrs* ([1896] 2 Ch. 690), and, like it, ceases during discoverture and revives upon subsequent marriage: *Tullett* v. *Armstrong* (1 Beav. 1; 4 My. & Cr. 377)*; *Stroud* v. *Edwards* (77 L. T. 280). If a woman while unmarried consumes or converts the property into wasting securities, the separate use, and with it the restraint upon anticipation, is at an end: *Wright* v. *Wright* (2 J. & H. 647). In this case there were no trustees. Where there are trustees a demand to pay and payment of the money to her will produce the same result (*ib.*). A contrary decision would lead to the absurd consequence that a person about to marry a lady with a house would be bound to inquire into the history of every article of furniture; and if it should turn out that any article of furniture had been purchased with money produced by the sale of property settled to her separate use, the husband must be considered as adopting the property in that state, and is bound not to interfere with it.

Its effect during coverture.

When the restraint has once become effectual through marriage, a woman cannot while married assign the property so restrained directly; nor can she do so indirectly, *e.g.* by election, *In re Vardon's T.*, *post*, p. 309; *Hamilton* v. *H.* ([1892] 1 Ch. 396), by estoppel or admission, *Lady Bateman* v. *Faber* ([1898] 1 Ch. 144), by her fraud, *Arnold* v. *Woodhams* (16 Eq. 29); *Stanley* v. *S.* (7 Ch. D. 589), nor by her instigating a breach of trust, *Ricketts* v. *R.* (64 L. T. 263); *Bolton* v. *Curre* ([1895] 1 Ch. 544); nor can such property be affected by sequestration orders: *Hyde* v. *H.* (13 P. D. 166). The only exception to this is in the case of ante-nuptial debts, whether under the *M. W. P. Act* of 1870 (s. 12), *Axford* v. *Reid* (22 Q. B. D. 548), approving *Sanger* v. *S.* (11 Eq. 470); *London and Provincial Bank* v. *Bogle* (7 Ch. D. 773), or under the *M. W. P. Act*, 1882 (ss. 13, 15); and such debts include debts contracted during a former marriage, *Jay* v. *Robinson* (25 Q. B. D. 467), and debts of a testator who devised land to her before her marriage: *In re Hedgely* (34 Ch. D.

As to ante-nuptial debts.

379). With regard to such debts, she is a *feme sole* even for the purposes of the *Debtor's Act* (s. 5): *Robinson, King & Co.* v. *Lynes* ([1894] 2 Q. B. 577).

Its effect on a gift of capital.

Where income is not mentioned, and (land or) money, etc., is given to her separate use without power of anticipation, the better opinion is that restraint attaches to the sum and the income thereof during coverture, whether the sum is reversionary, *In re Tippett's and Newbould's C.* (37 Ch. D. 444), or not, *In re Grey's S.* (34 Ch. D. 712); *In re Currey* (32 Ch. D. 361), unless there is a clause directing payment of the sum to her, or authorizing her to give a receipt therefor, as in *In re Bown* (27 Ch. D. 411); *In re Homes* (67 L. T. 335); *In re Fearon* (45 W. R. 232); and *Munt* v. *Glynes* (41 L. J. Ch. 639) (decided on another point). Where the property is reversionary the restraint will attach in any case to the property while reversionary: *In re Bown* (*ubi supra*)*; In re Spencer* (30 Ch. D. 183).

Its effect on income.

Its effect is to restrain the alienation of income until it is due: when due it is (though unpaid) free separate property, and may be impounded for breach of trust, *Pemberton* v. *McGill* (1 Dr. & Sm. 268), and is liable, under the Act of 1882, for her debts, *Hood Barrs* v. *Heriot* ([1896] A. C. 174)*, overruling *Hood Barrs* v. *Cathcart* ([1894] 2 Q. B. 559) and approving *Rennie* v. *Ritchie* (12 Cl. & F. 204); *Cox* v. *Bennett* ([1891] 1 Ch. 617), etc. An order for costs affects so much of the income as was free at the date of the order, but not what became free thereafter, *ib.* Similarly with a judgment if at the date of the contract the property was free separate property: *Whiteley* v. *Edwards* ([1896] 2 Q. B. 48). Compare *Draycott* v. *Harrison* (17 Q. B. D. 147). Contrast *Colyer* v. *Isaacs* (77 L. T. 198). Under the Act of 1893 if at the date of the contract the property was restrained from anticipation it cannot be affected by any judgment although it has become free: *Barnett* v. *Howard* ([1900] 2 Q. B. 784). On the other hand, if at the date of bankruptcy her property was restrained from anticipation it vests in the trustee in bankruptcy the moment it becomes free: *In re Wheeler's S. T.* ([1899] 2 Ch. 717). If the decision in *Barnett* v. *Howard* is right it all but repeals the *M. W. P. Act*, 1893, s. 1 (*c*), is out of harmony with *Pemberton* v. *McGill* and *In re Wheeler's S. T.*, makes the property less liable for debts under the Act of 1893 than it was under the Act of 1882, and makes *Hood Barrs* v. *Heriot*, etc., obsolete. Yet *Hood Barrs* v. *Heriot*, etc., were not even cited in argument, and were treated as binding in *Colyer* v. *Isaacs*.

Perpetuities and anticipation.

That "invention of the Chancellors," known as restraint on anticipation, asserts inalienability as the policy of the law. But there is another invention of the Chancellors, known as the rule against perpetuities, which embodies an opposite policy. What happens when these two inventions clash? It has been held with more unanimity than logic that the second policy prevails over the first, and that the restraint on anticipation is as void as any settlement would be if it is imposed for a period exceeding lives in being and twenty-one years, and the period for gestation, if such exists: *In re Teagues' S.* (10 Eq. 564); *In re Cunynghame's S.* (11 Eq. 324); *In re Michael's T.* (46 L. J. Ch. 651); *In re Ridley* (11 Ch. D. 645); *Whitby* v. *Mitchell* (42 Ch. D. 502). *Herbert* v. *Webster* (15 Ch. D. 610) is consistent with these cases, for the rule against perpetuities is as inapplicable to the settlement as to a restraint against anticipation of a share which is ascertainable at a testator's death: *In re Russell* ([1895] 2 Ch. 698).

Settled Land Acts, and anticipation.

If for the purpose of the rule against perpetuities a restraint on anticipation is regarded in the same light as a settlement, why should not this be the case with regard to the *S. L. Acts?* But, as we shall see, a restraint on anticipation is not of itself a settlement, though under the language of sect. 58 (ix.) the same effect is produced as though it was a settlement: *Bates* v. *Kesterton* ([1896] 1 Ch. 159); *In re Pocock and Prankerd's C.* ([1896] 1 Ch. 302); see *infra S. L. Act*, p. 136.

Principle on which the Court acts in removing restraint.

The principle on which this Court acts in removing restraint is thus stated in the l.c.:—

"All that the *Conveyancing Act* authorizes the Court to do is, notwithstanding a restraint on anticipation, to bind by an order a disposition of a married woman—that is, if a married woman has made a disposition which the Court thinks for her benefit, the Court makes that particular disposition binding; but the Act did not give the Court power generally to remove the restraint. The Court has, no doubt, in certain cases allowed funds to be parted with on the ground of a woman being past child-bearing, but in those cases security had been given for the property to be refunded, if necessary. Latterly, the Court has discouraged that sort of arrangement. The Court would be setting a bad example if, in a case like this, it were to sanction any disposition by a married woman which would defeat the interests of any children who might be born."

Cases where applied.

The restraint was removed in *Musgrave* v. *Sandeman* (48 L. T. 215) and *In re Currey* (32 Ch. D. 361), which scarcely get beyond the old principle of *Wilton* v. *Hill* (*ubi supra*); in *Sedgwick* v. *Thomas* (48 L. T. 100), for the purposes of the costs of an action to rectify an instrument, she having undertaken to pay the costs; in *In re Milner's S.* ([1891] 3 Ch. 547), for the purpose of paying interest on a mortgage and premiums on a policy in which she was interested: compare *In re Little's Will* (36 Ch. D. 701); in *Ex parte Thompson* ([1884] W. N. 28), in order to enable her while living apart from her husband to carry on her business; in *In re Tippett's and Newbold's C.* (37 Ch. D. 444) and *Bates* v. *Kesterton* ([1896] 1 Ch. 165) to complete a contract of sale; in *In re Sawyer's T.* ([1896] 1 I. R. 40) to make an advancement; in *In re Wilson-Stewart* (75 L. T. 381) and in *Hodges* v. *H.* (20 Ch. D. 749) for payment of debts; and in *In re C.'s Settlement* (56 L. J. Ch. 556) for payment of the husband's debts guaranteed by her. In *Paget* v. *P.* ([1898] 1 Ch. 470) the Court allowed her to raise money and give it to her husband for payment of his debts.

Cases where not applied.

It has been refused in the case of a married woman releasing a power for her own benefit and then applying for removal of the restraint: see *In re Little* (40 Ch. D. 418). In this case reliance was placed on a case disapproved of in *In re Radcliffe* ([1892] 1 Ch. 227); compare *In re Somes* ([1896] 1 Ch. 250). In *In re Jordan* (34 W. R. 270) the Court refused to remove a restraint on the ground that such removal might forfeit her estate under one of the provisions of the will imposing the restraint. It was not removed where its removal would have caused her estate to indemnify a trustee against a wrong investment made at her request: *Bolton* v. *Curre* ([1895] 1 Ch. 544), nor where its removal would have increased the wife's income: *In re Blundell* ([1901] 2 Ch. 221); a case in which the woman, being past child-bearing, was mistress of the fund but for the restraint. And the rule is that it will not be removed in order to pay debts arising through her extravagance or her husband's. *In re Pollard's S.* ([1896] 2 Ch. 552); *In re S.'s S.* ([1893] W. N. 127); *In re P.'s S.* (12 T. L. R. 322). Compare *Molyneux* v. *Fletcher* ([1898] 1 Q. B. 648).

Practice.

Application to the Court is by summons at Chambers (sect. 69 (3)). Separate examination of the married woman is unnecessary: *Hodges* v. *H.* (*ubi supra*); but see *Musgrave* v. *Sandeman* (*ubi supra*).

Limited Owners—Equitable and other Waste.

BAKER *v.* SEBRIGHT.

(13 Ch. D. 179.)

Principle.

The principle upon which the Court interferes with a limited owner, in respect of equitable waste, is that he is "using his powers unfairly," "making an unconscientious use of his powers."

Summary of facts.

Sir John G. Sebright, the equitable tenant for life without impeachment of waste of the Beechwood Estate, had cut down a large amount of ornamental timber and applied the proceeds to his own use. It appeared that all the trees so cut were injurious to or impeded the growth of other adjoining trees, which were of essential importance for ornament or shelter. It was held that Sir J. Sebright was entitled to retain the proceeds of the timber cut.

Equitable waste by tenant for life unimpeachable for waste.

The Court of Equity interferes to prevent a tenant for life dispunishable for waste from committing "equitable waste" in order to prevent the wrongful exercise of a legal right. The "spirit" or what lawyers call "the general intention" of the settlement must be adhered to where it conflicts with the "letter" or particular intention. Accordingly the tenant for life was restrained, because, though he had legal powers, "he was not using them fairly, he was abusing them so as to destroy the subject of the settlement." Thus in *Vane* v. *Lord Barnard* (2 Vern. 738) it was unconscientious in the tenant for life to take the roof off Raby Castle to spite the remainderman; and it is equally unconscientious in a tenant for life "to cut down ornamental timber so as to destroy the amenity or beauty of the estate." The Court cannot determine what is ornamental timber, that being merely a matter of taste; and what was planted for ornament must be considered as ornamental: *Lord Mahon* v. *Lord Stanhope* (3 Madd. 523, n.); *Coffin* v. *C.* (Jac. 70). Nor can it, nor ought it to preserve all such timber; the settlor cannot have quite wished that. "No Court of Equity or any other Court could control the operations of nature, and therefore the Court could not say that the whole of the ornamental timber should be preserved when the trees were growing so thickly as to destroy one another, but what it could do and what it does do, is to preserve it as far as possible." Therefore it followed that in this case the tenant had not committed equitable waste; he had only done what the settlor would have done or the Court itself would have ordered to be done; therefore he was entitled to the proceeds thereof.

Two cautions must be added. No tenant for life may cut down ornamental timber simply because it is decaying, although the Court if applied to might order that to be done. Secondly, if the remainderman comes to the Court before the tenant for life has cut any ornamental timber he is entitled to an injunction, "on the ground that the Court interferes to prevent irremediable mischief," and will only allow the tenant for life "to cut under its direction and supervision as in other cases of administration" (pp. 185, 188); and see *Bubb* v. *Telverton* (10 Eq. 465).

The doctrine of equitable waste was spoken of by Turner, L.J., in *Micklethwait* v. *M.* (1 De G. & J. 504, 524), as "an encroachment" on the legal rights of the tenant for life. "I do not," said Jessel, M.R., "admire that term 'encroachment,' because almost all the doctrines of Equity were interference with a legal right, and that term is rather a term of opprobrium when it ought to be a term of praise. The interference of Courts of Equity with legal rights was for the improvement of the law and the furtherance of justice, and therefore to say that a doctrine of Equity is an 'encroachment' on a legal right is simply to censure the whole doctrine of Equity."

Judicature Act, 1873.

Sect. 25 of the *Judicature Act*, 1873, sub.-sect. 3 confirms the law on equitable waste.

Legal

In *In re Barrington* (33 Ch. D. 523, 527), Kay, J., citing *Bagot* v. *B.*

waste by tenant for life without impeachment for waste. Minerals, etc.

(32 Beav. 509; 33 L. J. Ch. 122, n.), asserted that the law as to timber and minerals was identical (p. 527), and that "the same law applies if the timber be severed by the act of God as by tempest or by a trespasser," or, he might have added, by a tenant for life—so far as the respective rights of tenant for life and remainderman are concerned. In the case before him minerals were devised to two successive life tenants without impeachment of waste. During part of each life a trespasser had worked the minerals, and had subsequently paid compensation for his wrongful act. It was held that the compensation moneys belonged to the estate of each life tenant in proportion to the value of the mineral abstracted in each respective life. Further, a railway company restrained a lessee from working minerals underneath their railway, and paid compensation under sect. 74 of the *Lands' Clauses Act*, 1845. The then tenant for life was entitled to that part of the compensation which was payable to the reversioner, as the minerals in question could have been worked out during his life. He would not have been so entitled if the money had exceeded £200, and had been paid in under sect. 69 of the Act, as was the case in *In re Robinson's S. T.* ([1891] 3 Ch. 129). In these cases under the *L. C. Act* there was no apportionment as between successive life tenants. Compare *Jodrell* v. *J.* (7 Eq. 461).

Legal waste by tenant for life impeachable for waste. Timber.

Limited owners impeachable for waste may cut down and sell any trees which are not timber, as long as they do not destroy "germins" or "stools of underwood," or trees planted to protect banks, and the like. Yet in an exceptional case, where a gale swept away whole plantations of larch trees (which are not timber, and do not grow from an old "stool"), the Court settled the proceeds of sale: *In re Harrison's T.* (28 Ch. D. 220; see order, p. 230). They may not cut down and sell "timber," except as authorized by the *S. L. Act* (see Note). Oak, ash, and elm are timber by the general law, and by local custom beech, birch, hornbeam, willow, blackthorn, or whitethorn may be timber. But how about timber trees too young to provide timber? (The age is usually fixed at twenty years, but varies with local custom.) It is well-established law that the tenant for life may cut down infant timber (if it may be so called) if this course is necessary to allow the growth of other timber in the same plantation; but it was decided for the first time in *Honywood* v. *H.* (18 Eq. 306)* that if he does, he can appropriate the proceeds. Jessel, M.R., laid down the law as regards "timber" (by which he meant timber other than infant timber) as follows:—Timber cut down "either by the tenant for life or anybody else, or blown down by a storm, belongs at law to the owner of the first vested estate in inheritance," and it belongs to him, of course, as personalty, *In re Ainslie* (30 Ch. D. 485); and the Statute of Limitations begins to run from the date of severance: *Higginbotham* v. *Hawkins* (7 Ch. 676); *Seagram* v. *Knight* (2 Ch. 628). "But if tenant for life and remainderman are in collusion (or the same person), equity will prevent the rights of a mesne life-tenant or termor from being prejudiced thereby: *Birch-Wolfe* v. *Birch* (9 Eq.

683). Again, decaying timber can only be cut by permission of the Court, and the Court will settle the proceeds: *Phillips* v. *Barlow* (14 Si. 263). A third exception, which occurred in *Lowndes* v. *Norton* (6 Ch. D. 139), was not referred to by Jessel, M.R. In that case the proceeds of timber cut down by the tenant for life impeachable for waste were paid into the Court. As the Court approved of the cutting down, the fund was settled, and the income paid to the first tenant for life, as in *Hartley* v. *Pendarves* ([1901] 2 Ch. 498)—this would not have been the order if he had acted wrongfullv—(28 Ch. D. 228); *Seagram* v. *Knight*, *supra;* and since, as in *Phillips* v. *Barlow*, the first tenant for life in remainder was without impeachment for waste, he and not the ultimate remainderman was entitled to it when his estate fell into possession.

Timber estates.

But the whole law as to timber was, according to Jessel, M.R., subject to an exception "in favour of the owners of timber estates—that is, estates which are cultivated merely for the produce of saleable timber, and where the timber is cut periodically. The reason of the distinction is this, that as cutting the timber is the mode of cultivation, the timber is not to be kept as part of the inheritance, but part so to say of the annual fruits of the land, and in these cases the same kind of cultivation may be carried on by the tenant for life that has been carried on by the settlor on the estate, and the timber so cut down periodically in due course is looked upon as the annual profits of the estate, and therefore goes to the tenant for life. With that exception, I take it that a tenant for life cannot cut timber."

This exception has its source in Roman Law, and through ecclesiastical law (the distinction of timber and non-timber trees was first established in cases relating to tithes) has filtered into English law. But there is no conspicuous case in which the existence of timber estates has been recognized before *Dashwood* v. *Magniac* ([1891] 3 Ch. 306)*. In that case it was proved that beech was timber by local custom, and that it was the usage of the estate in question, and of the neighbouring estates, for over sixty years, to thin the beech woods periodically, and to cut the larger in order that the smaller beech might grow. Lady Dashwood, the tenant for life impeachable for waste, had derived a large income from this practice. The attempt to make her estate refund this income after her death failed. The question in this case was complicated by the fact that the timber which she cut and sold was not exclusively beech. But in their decision the Lord Justices treated beech and other timber alike. Lindley, L.J., likened customs to cut timber to customs to sell flints, *Tucker* v. *Linger* (8 A. C. 508), or cut turf: *Coppinger* v. *Gubbins* (3 J. & Lat. 397). Bowen, L.J., found a parallel for "timber estates" in the "mineral estates" referred to in *Campbell* v. *Wardlaw* (8 App. Cas. 641, 650). He urged that when a testator granted the annual produce of his estate to a tenant for life, he had in mind "the well-known course of arboriculture which a testator might well consider necessary in his own woods, and assume would be continued there in the absence of directions to the contrary. . . . The instance to which the legal principle is now for the first time adopted by this Court may be new, but the principle is old and sound; and the English law is exhaustive, and will apply old principles, if need requires it, to new contingencies. . . . In a case like the present, good sense borrows the doctrine which has hitherto found its most remarkable illustration in the instance of the open mine, and applies it to the more novel case of a timber-plantation which is cultivated for periodical croppings, and which forms a substantial item of yearly revenue to the owner of the property. . . . The case of the open mine is not an anomalous paradox, which is to be found crystallized and embedded in the law of real property, but only an illustration of the mode in which the law gives a reasonable effect to the language of a grant, even though the result is to allow the 'inheritance to be consumed by a limited owner':" *Dashwood* v. *Magniac* ([1891] 3 Ch. 306, 360, 367). See also *Pardoe* v. *P.* (82 L. T. 547).

Mines, quarries, pits, etc.

The right referred to by Bowen, L.J., with regard to opening mines was defined thus by Lord Blackburn: "Where at the time when the person having a limited interest comes into possession minerals have been already opened, whether coal-pits or quarries or the like, the person who has that limited interest shall be at liberty to continue to work those coal-pits or quarries which have been already opened:" *Campbell* v. *Wardlaw* (8 A. C. 641, 645), and to lease them and take the profits: *Clegg* v. *Rowland* (2 Eq. 160); *Greville-Nugent* v. *Mackenzie* ([1900] A. C. 83). If, however, it is shown that the coal-pits or quarries were opened wrongfully, a limited owner would not be authorized to continue to work them. See *Ecclesiastical Commissioners* v. *Wodehouse* ([1895] 1 Ch. 552), a case which decided that an incumbent is in the same position as a tenant for life impeachable for waste—except where his disability is removed by the Ecclesiastical Commissioners under their statutory powers. In *Elias* v. *Snowdon Slate Quarries Co.* (4 A. C. 454) there was a mortgagee in possession, as to whom see p. 232. There A. B. mortgaged his estate to C. D. for a term of years; then opened quarries not merely for purposes of "home consumption;" then granted quarries to a lessee for "commercial" purposes. Afterwards the mortgagee foreclosed and entered into possession. It was held that C. D. could work any quarry on the estate in the same sort of way as A. B. or his lessee had done at any date previous, not to the mortgage, but to the foreclosure. In this case it was not easy to distinguish between new mines, *In re Maynard* v. *S. E.* ([1899] 2 Ch. 347) and new workings of old mines, *Cowley* v. *Wellesley* (1 Eq. 656). "The tenant for life of an estate on which there are open mines receives the royalties payable," just as he takes fines and heriots arising from copyholds and renewable leaseholds, per Jessel, M.R., in *Brigstocke* v. *B.* (8 Ch. D. 357); see, too, *In re Medows* ([1898] 1 Ch. 300), *In re Kemeys Tynte* ([1892] 2 Ch. 211)†, *Greville-Nugent* v. *Mackenzie, supra,* unless the settlor otherwise provides: *Simpson* v. *Bathurst* (5 Ch. 193). These questions resemble those of bonus: *Bouch* v. *Sproule* (12 A. C. 385); *In re Alsbury* (45 Ch. D. 237); *In re Northage* ([1891] W. N. 84); *In re Armitage* ([1893] 3 Ch. 337); *In re Malam* ([1894] 3 Ch. 578). A tenant for life impeachable for waste grants leases of open mines under the *S. L. Act*, 1882, sect. 11 (see Note), on the same terms as to apportionment as a tenant for life dispunishable for waste: *In re Chayter* ([1900] 2 Ch. 804), citing *In re Ridge* (31 Ch. D. 504).

Ameliorating waste.

Waste means an alteration of the nature of the thing. If it is alteration for the better, as by building a new house, *Jones* v. *Chappell* (20 Eq. 539), changing barns into houses, *Doherty* v. *Allman* (3 A. C. 709)*, or fields into market-gardens, *Meux* v. *Cobley* ([1892] 2 Ch. 253), the Court no longer interferes. But if a tenant deals with a piece of waste like old John Harmon, it will interfere, for the waste is changed —possibly for the worse: *West Ham, etc., Board* v. *East London Waterworks* ([1900] 1 Ch. 624). All these were cases of landlord and tenant, as to which see *Agricultural Holdings Act*, 1883, s. 42. Limited owners are especially dealt with in the *S. L. Acts*. Unauthorized improvements by trustees (p. 209), joint tenants (p. 145), mortgagees (p. 232), victims of mistake (p. 91), life-tenants who as constructive trustees buy a fee simple, *Rowley* v. *Ginnever* ([1897] 2 Ch. 503), are allowed for on accounts being ordered, on the analogous principle of compensation for improvements.

Permissive waste.

An equitable tenant for life of leaseholds is liable to settlor's estate for keeping the leaseholds in repair, whether a trustee is or is not interposed, *In re Betty* ([1899] 1 Ch. 821); *In re Gjers* ([1899] 2 Ch. 54)†, following *In re Redding* ([1897] 1 Ch. 876), except as to breaches of covenant before his interest began, *In re Courtier* (34 Ch. D. 136). Compare *In re Fowler* (16 Ch. D. 723, *post*, p. 386 (8)). Such liability is to the estate, not to the remainderman: *In re Parry & Hopkin* ([1900] 1 Ch. 160). A tenant for life of freeholds is under no such obligation to the remainderman, *In re Cartwright* (41 Ch. D. 532), nor to the trustees, *Barnes* v. *Dowling* (44 L. T. 809); *In re Freeman* ([1898] 1 Ch. 28); *In re Hotchkys* (32 Ch. D. 408), unless the estate is expressed to be subject to an obligation to repair: *Dashwood* v. *Magniac* ([1891] 3 Ch. 335–39); *In re Williames* (54 L. T. 105); *Woodhouse* v. *Walker* (5 Q. B. D. 404); *Dingle* v. *Coppen* ([1899] 1 Ch. 726). In these cases an action can be maintained by the owner in fee of the immediate reversion; and "the proper measure of damages is the sum which is reasonably necessary to put the premises in the state of repair in which the tenant for life ought to have left them:" (5 Q. B. D. 408). Sometimes the obligation is imposed by copyhold custom or foreign law, *Blackmore* v. *White* ([1899] 1 Q. B. 293); *Batthyany* v. *Walford* (36 Ch. D. 269). The obligation is described sometimes as implied contract, sometimes as tort: that sort of tort which, being founded on some duty to be performed, does not die with the person (*ib.*, p. 279). For measure of damages, compare *Whitham* v. *Kershaw* (16 Q. B. D. 613); *Ebbetts* v. *Conquest* ([1895] 2 Ch. 377; [1896] A. C. 490). In *Conway* v. *Fenton* (40 Ch. D. 512), where tenants for life in possession committed permissive waste, and the remainderman lived with them and was an infant, and there was a trust for sale, the Court allowed capital moneys held on the same trusts as the realty to be devoted to repairs; but this course would not be adopted where these conditions did not concur: *In re De Teissier's S. E.* ([1893] 1 Ch. 153); *In re Montagu* ([1897] 2 Ch. 8); *In re Willis* ([1901] W. N. 208). Capital expenditure was not allowed in these cases in order to save the inheritance. Contrast *In re Jackson* (21 Ch. D. 786) (infant in possession).

Public Health Acts.

The cost of drainage works under the Public Health Act, 1891, is payable out of capital where the estate is leasehold forming part of a residue, *In re Lever* ([1897] 1 Ch. 32). Compare *In re Thomas* ([1900] 1 Ch. 319). The cost of repairs ordered under the same Act falls on income: *In re Copland's S.* ([1900] 1 Ch. 326).

NOTE.—*Settled Land Act.*

Power to commit waste under S. L. A.

Sect. 29 of the *S. L. Act*, 1882, authorizes tenants for life within the meaning of the Act to get and work freestone, limestone, and clay, and to "cut down and use timber and other trees not planted or left standing for shelter or ornament," in order to execute and repair improvements authorized by the Act.

Trial-pits and "planting" (which is no longer confined, as in the *S. E. Act*, 1877, to planting for shelter) are enumerated among the authorized improvements to which capital trust money may be applied under sect. 25, and sect. 28 (sub-sect. 2) declares "that the tenant for life or any of his successors as aforesaid shall not cut down or knowingly permit to be cut down, except in proper thinning, any trees planted as an improvement under the foregoing provisions of this Act. Compare, where the consent of the Board of Agriculture is obtained, *Improvement of Land Act*, 1864, s. 34, and, where infants are entitled, sect. 42 of the *C. Act*, 1881, and sect. 59 of the *S. L. Act*, 1882.

Sect. 35 of the *S. L. Act*, 1882, provides:—

"(1) Where a tenant for life is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees of the settlement or an Order of the Court, may cut and sell that timber, or any part thereof.

"(2) Three-fourth parts of the net proceeds of the sale shall be set aside as and be capital money arising under this Act, and the other fourth part shall go as rents and profits."

Sect. 11 apportions the rent of mining leases on the same principle where tenant for life is impeachable for waste. A *vice versâ* principle applies where he is dispunishable for waste.

Limited Owners—The Settled Land Acts.

LORD R. BRUCE *v.* MARQUESS OF AILESBURY.

([1892] 1 Ch. 506; [1892] A. C. 356.)

In re JONES.

(26 Ch. D. 736.)

Principle.

The object of these Acts is the well-being of settled land, and to make it always marketable. Therefore the person entitled to receive the income of settled land is tenant for life within the meaning of the Settled Land Act, 1882, *though he derives no income from the estate.*

Summary of facts.

In the first of these cases the Marquess of Ailesbury, aged twenty-eight, and a spendthrift, was tenant for life of Savernake estate. He had mortgaged his life estate to a money-lender named Samuel Lewis, who put a receiver into possession. Lord Iveagh offered to buy the whole estate on advantageous terms, if the tenant for life obtained the consent of the Court to the sale of that part of the estate which consisted of the mansion house and Savernake forest. All the remaindermen opposed the sale. The C. A. and House of Lords held that the Court should consent to the sale in the interests of the tenantry.

In the second case Colonel Grey was entitled to the surplus income of settled land after payment of the interest on incumbrances and an annuity. The rents, after payment of the interest, were insufficient to pay the annuity, and there was no probability that there would be any income for Colonel Grey to receive for many years to come. Held, by the C. A., that Colonel Grey was entitled to exercise the powers of a tenant for life.

Other powers saved by these Acts.

The *S. L. Acts* do not abolish the general jurisdiction of the Court over settled land, "but afford a guide to the Court:" *In re De Teissier's S. E.* ([1893] 1 Ch. 165); *In re Willis* ([1901] W. N. 208) (salvage); *In re Richardson* ([1900] 2 Ch. 778, 785), approving *In re Bagot's S.* ([1894] 1 Ch. 177) (possession), *In re Ormrod's S. E.* ([1892] 2 Ch. 318) (legal costs).

Nor do they repeal the Settled Estates Act, 1877, except s. 17, but they practically supersede it.

Object of these Acts.

The general object of the *S. L. Act*, as described in *Cardigan* v. *Curzon-Howe* (30 Ch. D. 536), was "to confer upon the present generation of landowners the means of alienation which by the ingenuity of conveyancers and in the process of time they had become deprived of," and as described in *In re Clitheroe E.* (28 Ch. D. 378, 31 Ch. D. 135) "to enable tenants for life of settled land to sell, partition, lease and otherwise dispose of settled land freed from the restrictions which by the general law previously existing, and by the numerous statutes applicable to the subject, had up to the time of passing the Act prevented tenants for life from so dealing with settled land." The two leading cases went beyond this. In the first Lord Macnaghten contrasted this Act with the *Settled Estates Acts*, 1877, etc., and said, "In those Acts the legislature did not look beyond the interests of the persons entitled under the settlement. In the *S. L. Act* the paramount object of the legislature was the well-being of settled land" (p. 365); Lord Halsbury described it as an *Incumbered Estates Act*, and something more (p. 362); and Bowen, L.J., said, "the public interests in the sense of the interests of those who live upon the soil ought to outweigh all the considerations of sentimental interest in the family" ([1892] 1 Ch. 544, 545). The second l.c. applied the following maxim: "The object is to render land a marketable article notwithstanding the settlement:" per C. A. in *In re Mundy & Roper's C.* ([1899] 1 Ch. 288). The spirit and object of the Acts contain the key to characteristic decisions on the Acts such as the leading cases.

Chief terms in these Acts.

The Act gives artificial meanings to (1) "tenant for life," (2) "settlement," (3) "trustees of the settlement," (4) "Court"—which must be discussed before the powers conferred on life-tenant and trustees, or life-tenant and Court are explained.

(1) Tenant for life has possession,

(1) Sect. 2, sub-sect. 5 defines "tenant for life" as "the person who is for the time being under a settlement beneficially entitled to possession of settled land for his life." Further, if "in possession," persons entitled to the gross or net income of land for life or until sale or forfeiture, tenants by the curtesy, tenants in tail unable to bar the entail, tenants *pur autre vie* or in base fee, tenants in fee simple subject to gifts over, and tenants for life or *pur autre vie* subject to

gifts over or to trusts for accumulation, are included (sect. 58). Possession is the essential condition of "tenancy for life" whether under sect. 2 or under sect. 58.

actual or potential,

The second l.c. applied to sect. 58 "the startling paradox," as Lindley, L.J., termed it, "that a man could be entitled to income of land, though there was no income for him to receive;" and no prospect of his receiving any income for a considerable time. "You must," said Baggallay, L.J., "look at the terms of the settlement to see what the person is entitled to, and not to the accidental circumstance that the intention of the testator has been to some extent defeated by reason of the income which he intended the party to take not being actually realized in consequence of the state of the property." *Williams* v. *Jenkins* ([1893] 1 Ch. 700) applied a similar paradox to sect. 2. Possession in both cases meant a right to occupy; the tenant for life could in both cases have paid off all the charges and entered into immediate occupation. Potential occupation is enough.

i.e. possessing right,

The right to be let into possession is still subject to the discretion of the Court: *In re Hunt* ([1900] W. N. 65), but that discretion is guided by the spirit of the *S. L. Act*. Thus a legal tenant for life of premises subject to terms for giving him an annuity only and capitalizing the surplus for payment of mortgages: *In re Richardson* ([1900] 2 Ch. 778); *In re Money Kyrle's S.* ([1900] 1 Ch. 839), and an equitable tenant for life: *In re Newen* ([1894] 2 Ch. 297); *In re Wythes* ([1893] 2 Ch. 369), subject to a trust for sale, *In re Bagot's S.* ([1894] 1 Ch. 177), have been let into actual possession or given the title-deeds, *ib.*, and, *In re Burnaby's S. E.* (42 Ch. D. 621), although the trustees had active duties and powers of management, and although the tenants for life were married women: *In re Bagot's S.* The *S. L. Act* has enlarged that very right to occupy upon which it is based, and the effect has reacted on the cause.

unless excluded or waived.

But possession does not exist where the right to occupy is excluded. Thus a "tenant for life" after twenty years' accumulation, *In re Strangways* (34 Ch. D. 423): distinguish *In re Martyn* (83 L. T. 146), or who may occupy the premises if she wishes, but has helped others to lease the premises for twenty years: *In re Edwards' S.* ([1897] 2 Ch. 412) is not in possession until the twenty years have elapsed.

A trust to permit a widow to occupy a house rent free so long as she wishes makes her "tenant for life:" *In re Carnes' S. E.* ([1899] 1 Ch. 324); contrast *In re Edwards' S.* (*supra*).

More than one tenant for life.

Under sub-sect. 6, where persons so entitled are joint tenants, tenants in common or otherwise concurrently entitled, they are together "tenant for life." A jointress is not, *In re Marquis of Ailesbury and Lord Iveagh* ([1893] 2 Ch. 345), persons alternatively entitled under a discretionary trust are not, *In re Atkinson* (31 Ch. D. 577); *In re Horne's S. E.* (39 Ch. D. 84), nor are tenants for life of different undivided moieties, *Cooper* v. *Belsey* ([1899] 1 Ch. 639), concurrent owners. In a case under this sub-section more than one set of costs was allowed in *Smith* v. *Lancaster* ([1894] 3 Ch. 439).

Tenant for life under disability.

A married woman under sect. 61 may only act as tenant for life, if entitled for her separate use (whether restrained or not from anticipation), or if entitled as *feme sole* by statute. Otherwise she and her husband are together "tenant for life" of her property. A limitation to her separate use without power of anticipation, absolutely, does not constitute "a settlement" within the meaning of sect. 2, *Bates* v. *Kesterton* ([1896] 1 Ch. 159), but does within the meaning of sect. 58, sub-sect. 1 (ix.): *In re Pocock and Prankerd's C.* ([1896] 1 Ch. 302). Under sect. 62 a committee or other legal custodian of a lunatic may act for the lunatic as "tenant for life" on obtaining an order in lunacy in that behalf: *In re Ray's S. E.* (25 Ch. D. 464); *In re Ray* ([1896] 1 Ch. 468). See *In re Baggs* ([1894] 2 Ch. 416, n.); *In re Salt* ([1896] 1 Ch. 117), as to sales and leases respectively of property of a lunatic not so found.

Sect. 59 makes an infant absolutely entitled in possession to settled land a "tenant for life."

(2) Settlement.

(2) The definition of the term "settlement" in sect. 2, sub-sect. 1, is expressly retrospective, and includes, in addition to deeds, wills and agreements for settlement, all the various instruments there enumerated, or any number of instruments by which "any land, or estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession," to which estates and interests sub-sect. 2 adds: "An estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir;" and sect. 8 of the *S. L. Act*, 1884, adds a tenancy by the curtsey; and see sect. 4 of the *S. L. Act*, 1890. Thus A. is life-tenant under a deed of 1889, remainder to B. in fee simple. Jointures and portions are raiseable out of the premises on A.'s death under deeds of 1861 & 1865. A. is "tenant for life" under a compound settlement of 1861, 1865, and 1889, *In re Mundy and Roper's C.* ([1899] 1 Ch. 275)*, approving *Marquess of Ailesbury* v. *Lord Iveagh* ([1893] 2 Ch. 345). This decision has been extended to revenue cases: *A.-G.* v. *Owen*, *post*, p. 283.

If A. resettles his estate for life this may be regarded as a compound settlement, see sect. 4 of *S. L. Act*, 1890; *In re Tibbit's S. E.* ([1897] 2 Ch. 149); but when the tenant for life's estate for life is preserved although subject to new interests the Court disregards the resettlement: *In re Keck and Hart's C.* ([1898] 1 Ch. 617); *In re Ducane and Nettlefold's C.* ([1898] 2 Ch. 96).

It does not follow that because A. is "tenant for life" under a compound settlement he is not also "tenant for life" under one of the deeds composing the compound settlement: *In re Mundy and Roper's C.* (pp. 295, 296). The Court adopts whichever view harmonizes best with the spirit of the Act.

As to documents which together form one settlement, see *In re Marquis of Ailesbury and Lord Iveagh* ([1893] 2 Ch. 345) (four deeds); *In re Mundy's S. E.* ([1891] 1 Ch. 399); *In re Byng's S. E.* ([1892] 2 Ch. 219); *In re Lord Monson's S. E.* ([1898] 1 Ch. 427) (deed and will); *In re Lord Stamford's S. E.* (43 Ch. D. 84); *In re Freme* ([1894] 1 Ch. 1) (different provisions); *Ex parte Vicar of Castle Betham, etc.* ([1895] 1 Ch. 348) (award, and *Lands' Clauses Act*). Contrast *In re Bishop of Bath and Wells* ([1899] 2 Ch. 138); *Vine* v. *Raleigh* ([1896] 1 Ch. 37) (*Thellusson's Act*, and will). Derivative settlements of interests not yet in possession are disregarded: *In re Knowles' S. E.* (27 Ch. D. 707); *In re Ducane and Nettlefold's C.* ([1898] 2 Ch. 100, 107, 108).

Settled land.

Land, and any estate or interest therein, which is the subject of a settlement, is, for the purposes of this Act, "settled land," and is, in relation to the settlement, referred to in this Act as the settled land, and in sect. 2, sub-sect. 4, the question whether land is "settled land" is to be determined by the state of facts, etc., when the settlement takes effect. "Land" includes leases for years, remainders, reversions, rent-charges, tithes, advowsons, titles of honour, *In re Sir J. Rivett-Carnac's Will* (30 Ch. D. 136), New River shares, River Avon shares, River Don shares, and shares of tolls in lighthouses: *A.-G.* v. *Jones* (1 Mac. & G. 574); but most of the provisions in the Act apply only to corporeal hereditaments: Clerke's Settled Land Act, 2nd ed. p. 5.

(3) Definition of trustees of the settlement.

(3) The "trustees of the settlement" are defined as "The persons, if any, who are for the time being, under a settlement, (1) trustees with power of sale of settled land," with or without the consent of another, *Constable* v. *C.* (32 Ch. D. 233), (2) or "with power of consent to or approval of the exercise of such a power of sale, (3) or are by the settlement declared to be trustees thereof for purposes of this Act," *S. L. Act*, 1882, s. 2, sub-s. 8, or (4) "trustees with power of or upon trust for sale of any other land comprised in the settlement, and subject to the same limitations," or (5) "with power of consent to, or approval of, the exercise of such a power of sale," or (6) "trustees with future power of sale or under a future trust for sale of the land to be sold," or (7) as in (2), *S. L. Act*, 1890, s. 16. These trustees are appointable and removeable like other trustees: *Trustee Act*, 1893, s. 47.

(1), (2), and (3). Powers of tenant for life over settled land.

The *S. L. Acts*, 1882, 1884, 1887, 1889, and 1890, confer on the "tenant for life" powers of sale, enfranchisement, exchange, partition (ss. 3 to 5; *S. L. Act*, 1890, s. 5; *Housing of the Working Classes Act*, 1890, s. 74; *Small Holdings Act*, 1892, ss. 12, 13), powers of leasing for twenty-one years, or in the case of mining and building leases for sixty and ninety-nine years respectively (ss. 6 to 12; *S. L. Act*, 1889, s. 2; *S. L. Act*, 1890, ss. 7 to 9) of accepting surrenders and granting licences for leasing (ss. 13, 14). His power to contract and convey for these purposes is regulated by ss. 20, 31, 55, (2); *S. L. Act*, 1890, s. 6, and ancillary powers are contained in ss. 16, 17, 19. He may under these powers lease the surface only: *In re Gladstone* ([1900] 2 Ch. 101); *In re Duke of Rutland's S. E.* ([1900] 2 Ch. 206). For the purpose of enfranchisement, exchange, or partition (s. 18), or paying off incumbrances (*S. L. Act*, 1890, s. 11), he may mortgage the land. Incumbrances include statutory charges which he has paid off and kept alive: *In re Smith's S. E.* ([1901] 1 Ch. 689). One estate may be mortgaged to pay off charges on another if they belong to the same compound settlement: *In re Monson's S. E.* ([1898] 1 Ch. 427). His power to direct improvements with and investments of capital moneys paid to the trustees or into Court is limited by ss. 21–30, 34; *S. L. Act*, 1887, ss. 1, 2; *S. L. Act*, 1890, ss, 13, 15, 18; *Agr. Holdings Act*, 1883, s. 29; *ib.* 1900, s. 3; *Housing of W. C.*, 1890, s. 74. Instances of "capital money arising under the Act" are given in ss. 11, 18, 35, 37; *S. L. Act*, 1884, s. 4; *S. L. Act*, 1889, s. 3. Other capital moneys may be similarly applied, ss. 32, 33; *S. L. Act*, 1890, s. 14.

Power of Trustees.

Except in case of twenty-one years' leases, *S. L. Act*, 1890, s. 7, one month's notice must be given to the trustees of the settlement of an intended exercise by the tenant for life of his powers. The trustees at the date of notice must be at least two, unless a contrary intention appears in the settlement (sect. 45): *In re Garnett, Orme & Hargreaves' C.* (25 Ch. D. 595); *In re Earl Radnor's W. T.* (45 Ch. D. 413). A generally worded notice will do: *S. L. Act*, 1884, s. 5. The trustees may waive notice (*ib.*). Absence of notice does not affect a *bonâ fide* purchaser (sect. 45). If there are no trustees the remainderman may obtain an injunction against the tenant for life: *Wheelwright* v. *Walker* (23 Ch. D. 752); but a purchaser from the lessee cannot resist, although the tenant for life cannot bring against the lessee an action for specific performance: *Mogridge* v. *Clapp* ([1892] 3 Ch. 382). In cases involving payment of capital moneys (which must under sect. 22 be paid either to the trustees or into Court), trustees of the settlement must exist before the money is so paid: *Hatten* v. *Russell* (38 Ch. D. 334); *In re Fisher & Grazebrook's C.* ([1898] 2 Ch. 660). A purchaser not knowing that there were not trustees would get a good title on payment into Court (*ib*). The trustees are responsible for investments being proper: *In re Hotham* ([1901] 2 Ch. 790). Where the tenant for life is an infant the trustees exercise his powers (sect. 60). They also represent the tenant for life where otherwise he would be selling to himself: *S. L. Act*, 1890, s. 12.

Mode of exercise of powers by tenant for life.

The statutory powers of the tenant for life are under sects. 50, 51, 52 incapable of assignment or release, nor can they effect a forfeiture, *In re Paget's S. E.* (30 Ch. D. 161); *In re Ames* ([1893] 2 Ch. 479); *In re Smith* ([1899] 1 Ch. 331), and any contract not to exercise them or any prohibition or limitation of their exercise is void. But assigns for value must concur (sect. 50), excluding assigns under a settlement, *S. L. Act*, 1890, s. 4, but including chargees and trustees in bankruptcy, *In re Bedingfield and Herring's C.* ([1893] 2 Ch. 332); and the tenant for life, as a rule, pays the costs of concurrence of his own chargees; *Cardigan* v. *Curzon Howe* (41 Ch. D. 375). These powers are, moreover, "cumulative," *i.e.* additional to any powers conferred by a settlement, and in case of conflict with such powers the statutory powers are to prevail (sects. 56, 57); but the conflict referred to only means conflict between narrower and wider powers, *In re Duke of Newcastle's E.* (24 Ch. D. 129, 138); *In re Sudbury and Pointon E.* ([1893] 3 Ch. 74); and a lease valid either under an express power conferred before 1882 or under the Act will be regarded as granted under the express power: *Lord Lonsdale* v. *Lowther* ([1900] 2 Ch. 687). Under sect. 56 the consent of a tenant for life is necessary for the exercise by any trustee of any power exerciseable for purposes of the Act, and see *S. L. Act*, 1884, s. 6. Under sect. 53 a tenant for life must exercise these powers conferred by the Act as trustee for all parties: *In re Lord Stamford's S. E.* (43 Ch. D. 84); *In re Lord Coleridge's S.* ([1895] 2 Ch. 704) (directing investment of capital moneys); *Hampden* v. *Earl of Buckinghamshire* ([1893] 2 Ch. 531; *In re Richardson* ([1900] 2 Ch. 778) (mortgaging); *Dow. Duchess of Sutherland* v. *Duke of Sutherland* ([1893] 3 Ch. 169); *Chandler* v. *Bradley* ([1897] 1 Ch. 315); *Middlemas* v. *Stevens* ([1901] 1 Ch. 574) (leasing). In the last four cases it was held that he was not acting as a trustee should act.

Effect of sale, etc.

Under sect. 20 a sale, etc., conveys, etc., the land free from "estates interests and charges subsisting or to arise" under "the settlement." Estates interests and charges having priority to "the settlement" or created for securing money then raised are saved. Hence the contests on whether a settlement is "compound," reaching back (say) to 1861, or "simple," as in *In re Mundy and Roper's C.* (*supra*), are important, as they determine the estate, etc., to which the conveyance is subject. The limitations of "the settlement" are detached from the land sold and attached to the proceeds of sale on land bought or received in exchange: sect. 22 (5), (6); sect. 24. This operates reconversion for all purposes, except that the Crown will take the proceeds of sale as *bona vacantia*: *In re Bond* ([1901] 1 Ch. 15).

(4) The Court under the *S. L. Act*, 1882.

(4) The *S. L. Act*, 1882, s. 46, sub-s. 1, assigns all matters under the Act and within the jurisdiction of the High Court of Justice to the Chancery Division, and sub-sect. 3 of the same section declares that every application to the Court shall be by petition or by summons at Chambers; but the rules under the *S. L. Act*, 1882 (r. 2), provide that if in any case a petition shall be presented without the direction of the Judge, no further costs shall be allowed than would be allowed upon a summons. It was held, however, in *In re Bethlehem and Bridewell Hospitals* (30 Ch. D. 541) that the Court has a discretion to allow the costs of a petition when such a mode of procedure is cheaper and more expeditious, but that the choice of procedure is at the risk of the applicant. As to the manner in which summonses under the *S. L. Act*, 1882, are to be entitled, see Annual Practice, 1902, p. 1069. The Court has power to make any order which it thinks fit, and to give directions as to raising and paying costs, charges, and expenses (sects. 46, 47). The latter expression includes the expenses of an unsuccessful sale: *In re Smith's S. E.* ([1891] 3 Ch. 65).

All proceedings in County Courts under the *S. L. Acts* must be commenced by petition: C. C. R. 1889, O. xxxviii., r. 1; Annual County Court Practice, 1901, p. 482.

Settled Estates Act, 1877.

Sect. 3 of the *S. E. Act*, 1877, provides that all causes and matters commenced or continued under this Act shall, subject to the provisions of the *Judicature Act*, be assigned to the C. D., and it may still occasionally be desirable to have recourse to its provisions. See *In re Farnell's S. E.* (33 Ch. D. 599); Clerke's S. L. Act, p. 21.

Powers of the Court.

The cases under which it is imperative to apply to the Court are as follows:—

1. Sect. 10. To authorize building and mining leases, or grants at fee farm or other rents not authorized by the Act, but usual in the district or otherwise expedient.

2. Sect. 31 (3). To obtain directions as to enforcing, carrying into effect, varying or rescinding contracts.

3. Sect. 36. To approve of proceedings for protection or recovery of land settled or claimed to be settled, and give directions as to and to raise costs, etc.: *In re Earl of Aylesford's S. E.* (32 Ch. D. 162); *In re Ormrod's S. E.* ([1892] 2 Ch. 318). Compare sect. 47.

4. Sect. 37. To sanction sale or purchase of heirlooms. As to exercise of discretion, see *In re Earl of Radnor's Will T.* (45 Ch. D. 402); *In re Houghton E.* (30 Ch. D. 102); *Bruce* v. *Marquis of Ailesbury* ([1892] A. C. 365; [1892] 1 Ch. 538); *In re Waldegrave* (81 L. T. 632) (heirlooms rotting). Leave will not be given for the sole reason that tenant for life has been extravagant: *In re Hope* ([1899] 2 Ch. 679); *In re Beaumont's S. E.* (58 L. T. 916). For application of proceeds, see S. C. and *In re Duke of Marlborough's S.* (32 Ch. D. 1); *In re Waldegrave.* An *ex post facto* sanction is not authorized: *In re Ames* ([1893] 2 Ch. 479).

5. Sect. 38. For appointment of trustees under the settlement for the purposes of the Act where there are none, see *Trustee Act*, 1893, s. 47.

6. Sect. 60. For appointment of persons to exercise powers of tenant for life, etc., where he is an infant and there are no trustees of the settlement; see *In re Countess of Dudley's C.* (35 Ch. D. 338) as to such sales.

7. Sect. 7 of *S. L. Act*, 1884, provides that the powers given by sect. 63 of the *S. L. Act*, 1882, are not to be exercised without the leave of the Court. See *In re Horne's S. E.* (39 Ch. D. 84); *In re Harding's E.* ([1891] 1 Ch. 60); *In re Bagot's S.* ([1894] 1 Ch. 177); and as to leases, *In re Daniell's S. E.* ([1894] 3 Ch. 503).

8. Applications may be made to the Court where differences between tenant for life and trustees arise under the Act (sect. 44), and conflicts occur between the provisions of the Act and of a settlement, etc. (sect. 56).

Option of dealing with the trustees or going to the Court.

The cases in which, under the *S. L. Act*, there is the option of dealing with the trustees of the settlement, or going to the Court, are as follows:—

1. Sect. 10 of the *S. L. Act*, 1890, provides that "the principal

mansion house (if any) on any settled land, and the pleasure grounds and parks and lands (if any) usually occupied therewith, shall not be sold, exchanged, or leased by the tenant for life without the consent of the trustees of the settlement or an order of the Court."

"Where a house is usually occupied as a farmhouse, or where the site of any house and the pleasure grounds and park and lands (if any) usually occupied therewith do not together exceed *twenty-five acres* in extent, the house is not to be deemed a principal mansion house within the meaning of the section." See *In re Sebright's S. E.* (33 Ch. D. 429); *Bruce* v. *The Marquis of Ailesbury* (*ubi supra*); *Dow. Duchess of Sutherland* v. *Duke of Sutherland* (*ubi supra*) (lease).

2. Under sect. 22 of the *S. L. Act*, 1882, for investment and application of "capital money arising under the Act."

3. Under sect. 26 of the *S. L. Act*, 1882, for approval of scheme for an improvement and the expenditure of capital money thereon. The Court allows prospective consent, see *In re Millard's S. E.* ([1893] 3 Ch. 116); *In re Duke of Norfolk's E.* ([1900] 1 Ch. 461)†; past expenses subsequent to 1882, and where there was no scheme, see *S. L. Act*, 1890, s. 15; *In re Ormrod's S. E.* ([1892] 2 Ch. 318); payments of part instalments of a rent-charge for improvements created by the *Improvement of Land Acts*, 1864 and 1899, see *S. L. Act*, 1887, s. 1; *In re Howard's S. E.* ([1892] 2 Ch. 233); *In re Dalison's S. E.* ([1892] 3 Ch. 522); *In re Verney's S. E.* ([1898] 1 Ch. 508). Compare *In re Lord Egmont's S. E.* (45 Ch. D. 395). As to release thereof, see *In re Earl of Strafford and Maples* ([1896] 1 Ch. 235). As to all these points, see *In re Marquis of Bristol's S. E.* ([1893] 3 Ch. 161). The Court allows new drains, *In re Thomas* ([1900] 1 Ch. 319), but see *In re Tucker's S. E.* ([1895] 2 Ch. 468); *In re Copland's S.* ([1900] 1 Ch. 326); farm buildings, cottages, etc., *In re Earl of Lisburne's S. E.* ([1901] W. N. 91); improvements on separate estates, *In re Mundy's S. E.* ([1891] 1 Ch. 399); *In re Coote* (81 L. T. 535); rebuilding of mansion house under *S. L. Act*, 1890, s. 13 (iv.), *In re Walker's S. E.* ([1894] 1 Ch. 189), but see *In re Wright's S. E.* (83 L. T. (159)† (alteration), and *In re Lord Gerard's S. E.* ([1893] 3 Ch. 252)*; alterations of buildings in order to let under *S. L. Act*, 1890, s. 13 (ii.), *In re Gaskell's S. E.* ([1894] 1 Ch. 485); *Stanford* v. *Roberts* ([1901] 1 Ch. 440); *In re Freake* ([1901] W. N. 337): distinguish *In re De Teissier's S. E.* ([1893] 1 Ch. 153; *In re Lord Gerard's E.*; *In re Tucker's S. E., supra*).

4. Under sect. 34 of the *S. L. Act*, 1882, for application of money paid for lease, etc., or reversion, and note that all decisions on sect. 74 of the *Lands Clauses Act*, 1845, are applicable to this section: *Cottrell* v. *C.* (28 Ch. D. 628).

5. Under sect. 35 of the *S. L. Act*, 1882, for cutting and sale of timber, see *In re Llewellin* (37 Ch. D. 317), and *ante*, p. 132. See Wolstenholme's Conveyancing Acts, etc., 8th edit.

Joint Tenants and Tenants in Common—Partition or Sale—The Court's Discretion.

PEMBERTON *v.* BARNES.

(L. R. 6 Ch. 685.)

Principle.

Sect. 4 *of the Partition Act*, 1868, *is imperative, and when the parties entitled to a moiety or upwards desire a sale, the Court must order it unless some good reason is shown to the contrary.*

Summary of facts.

The Tring Park Estate consisted of a mansion-house of great historical interest, upwards of 3600 acres of land, of which about 300 formed a park, together with manorial rights extending over thirty square miles of country. The plaintiffs, who were entitled to one moiety of the estate, filed their bill against the trustees of the estate and Dr. and Mrs. Barnes, who were entitled to the other moiety, claiming a sale of the property or, in the alternative, a partition. There was uncontradicted evidence that the Tring Park Estate if sold as a whole would realize a much larger price than if sold in moieties, and that it could not be satisfactorily partitioned; but the defendants objected to the estate being sold in order that the plaintiffs might obtain a fancy price, and denied that a sale would be more beneficial than a partition.

Lord Hatherley, L.C., being of opinion that no "real good plain cause" had been shown against a sale, ordered a sale, with liberty to the defendants to bid.

History of partition.

In 1539 and 1540 power was conferred on any joint tenant or tenant in common in possession of land, to compel his co-tenants to partition the estate by an action commenced with writ (31 Henry

VIII. c. 1; 32 Henry VIII. c. 32). Under these Acts the termor or life-tenant could not partition the estate for longer than his term or life lasted; nor could persons not parties to the partition be affected.

These Acts referred to lands corporeal and incorporeal, including leaseholds, tithes, and advowsons: *Bodicoate* v. *Steers* (1 Dick. 69), but excluding copyholds, and (according to Lord Coke) castles. The exclusion of copyholds was removed in 1841 (4 & 5 Vict. c. 35, s. 85); and it may perhaps be suggested that Lord Coke's reason for excluding castles—that they are necessary to the defence of the realm (C. upon L. 165, *a*)—is not quite so cogent as heretofore. Long before 1833 the Chancery Court had successfully substituted a Chancery suit for the older procedure; successfully because a suit was "much more convenient" than the old actions: per Lord Loughborough, L.C., *Calmady* v. *C.* (2 Ves. junr. 570); and the effect of 3 & 4 Will. IV. c. 27, s. 36, was to give the Chancery Court a monopoly of partition suits, a monopoly which is now assigned to actions in the Ch. D. by sect. 34 (3) of the *Judicature Act*, 1873. Yet even Chancery suits had some inconveniences, as when Lord Hardwicke partitioned a cold bath, *Warner* v. *Baynes* (Amb. 589); or as in the case mentioned in *Turner* v. *Morgan* (8 Vesey, 143), where the partition of a house was carried into effect by building up a wall in the middle; or as in *Turner* v. *Morgan* itself, where defendant objected on the ground that the Commissioners had allotted to the plaintiff the whole stack of chimneys, all the fireplaces, the only staircase, and all the conveniences in the yard, and Lord Eldon at once overruled the objection. He had, he said, no doubt what was to be done. Nor had Solomon when he partitioned the baby.

Sale generally.

The old rights conferred by the statutes of Henry VIII. are still in force, and were applied by North, J., when in *Mayfair Property Co.* v. *Johnston* ([1894] 1 Ch. 508) he partitioned a garden wall longitudinally. But the new remedy of sale has been tacked on to the old remedy of partition by the Partition Acts of 1868 and 1876.

The parties to the action and the right of bringing an action are the same in the case of partition and sale. Consequently a tenant in common in reversion cannot bring an action for sale or for partition: *Evans* v. *Bagshaw* (5 Ch. 340). Where a sale is asked for, partition may be ordered, and *vice versâ*, under the Act of 1876, s. 7. And the order may be for partition of one part and sale of another part of the property: *Roebuck* v. *Chadebet* (8 Eq. 127).

Sale is not necessarily alternative to partition. Thus where a sum is paid for equality of partition "that is not partition pure and simple, but is partition *plus* sale:" per Jessel, M.R., *Porter* v. *Lopes* (7 Ch. D. 358, 366). But where it is alternative, the power to order sale is limited to three cases, in each of which the Court exercises a different kind of discretion.

Sect. 5 of the Act of 1868.

Adopting Lord Blackburn's order, see *Pitt* v. *Jones* (5 A. C. 659) *, we will first consider the power of sale in sect. 5. This power enables the Court to order a sale on application by an interested party, even though there is no reason for preferring sale to partition. The sale, however, will not take place if any other interested party "undertakes" to buy the share of the applicant, and the applicant agrees to sell it at a valuation fixed by the Court.

Nor will the sale take place if after the "undertaking" the applicant refuses to sell his share, because such refusal to sell is regarded as a withdrawal of the original "application:" *Williams* v. *Games* (10 Ch. 204); *Drinkwater* v. *Radcliffe* (20 Eq. 528, 531); *Gilbert* v. *Smith* (11 Ch. D. 78), S.C. nom.; *Pitt* v. *Jones* (5 A. C. 651). An application for a sale under sect. 5 was made and refused in *Richardson* v. *Feary* (39 Ch. D. 45).

Sect. 4 of the Act of 1868.

Secondly, there is a power of sale under sect. 4 of the Act of 1868. Where parties interested in one-half or more of the property request a sale, "the Court shall, unless it sees good reason to the contrary, direct a sale." The order is imperative, and will not be stayed by undertakings or acceptance or rejection of undertakings to buy the share of applicants at a valuation. (Some remarks of Lord Hatherley to this effect in the l.c. were overruled by the above-cited cases.)

"Good reason to the contrary" discussed,

What, then, is "good reason to the contrary"? Lord Hatherley suggested a request "manifestly" dictated by "vindictive feeling" (*ib.*). Hall, V.C., rejected a plea that the income of infant defendants might be diminished: *Rowe* v. *Gray* (5 Ch. D. 263). In *Saxton* v. *Bartley* (48 L. J. Ch. 519) the plea that a sale would diminish the income received by one of the defendants by one-half, and that the action would not have been brought but for ill-feeling between the parties, was allowed by Bacon, V.C.

and illustrated by special values,

In *Porter* v. *Lopes* (7 Ch. D. 358), Jessel, M.R., suggested the following as possible "good reasons to the contrary":—The property "may be temporarily very much depreciated in value," *e.g.* "if there were two ironworks of equal value, and one party asked for a partition and the other for a sale, and at that time the furnaces were out of blast." Again, "property may be of a peculiar description so as not to be actually saleable," *e.g.* property valuable as an appanage to other property, but by itself valueless. He instanced manorial rights, rights to game, outhouses, etc. But as these arguments were inapplicable to the case in question, they are only *dicta.* The case, however, decided that the argument that there was a *pretium affectionis* involved (like that in the l.c.) was only an argument that the party who raised it should be allowed to bid at the sale, under sect. 6 of the Act of 1868: *In re Dracup* ([1894] 1 Ch. 59). In *Wilkinson* v. *Joberns* (16 Eq. 14) Lord Selborne had already decided that the fact that the land was used for commercial purposes was the reverse of a "good reason to the contrary."

by tenancy of the whole property,

In *Wilkinson* v. *Joberns* (*ubi supra*) a question as to the expediency of granting an order for sale was raised because one co-tenant was yearly tenant of the whole property. But similar difficulties occur in cases of partition: see *In re Jones, Farrington* v. *Forrester* ([1893] 2 Ch. 461), where the tenant (for life) borrowed money on mortgage for making improvements. The present value of the improvements (but not exceeding the amount so borrowed) was charged on both moieties in the partition action: *In re Cook's M.* ([1896] 1 Ch. 923); *Williams* v. *W.* (81 L. T. 163) *Kenrick* v. *Mountsteven* (48 W. R. 141).

But this remedy can only be enforced as between co-owners in partition actions, *Leigh* v. *Dickeson* (15 Q. B. D. 60), and not in common law actions (*ib.*), nor as against outsiders: *Hill* v. *Hickin* ([1897] 2 Ch. 579). The principle of compensation for improvements has been often asserted by equity. *Ante*, p. 131.

by overriding mortgages,

In *Sinclair* v. *James* ([1894] 3 Ch. 554) there was a mortgagee of an undivided share, against whom partition could not be ordered, as it would have changed the nature of his security. Compare *Gibbs* v. *Hayden* (30 W. R. 726). Where there is a mortgagee of the whole estate, the Court inquires "what mortgages affect the whole property, and in a proper case order a sale with the concurrence of such of the mortgagees as will concur," or else to order a sale subject to the mortgage: *Sinclair* v. *James*. Compare *Waite* v. *Bingley* (21 Ch. D. 674); *Heckles* v. *H.* ([1892] W. N. 188), cited in *Hill* v. *Hickin* (*supra*).

and by overriding trusts.

Where there is an overriding trust the Court will refuse a sale. In *Taylor* v. *Grange* (15 Ch. D. 165) trustees had power and were "directed" to work a quarry during the lives of tenants in common. In *Biggs* v. *Peacock* (22 Ch. D. 284) there were trustees to sell realty "at such time as they should think fit;" but the beneficiaries were *sui juris*, and therefore any one of them might insist on the trust for sale being carried out at any time. Consequently in these two cases the Court refused to order a sale. These discretionary trusts were construed as trusts with which the Court was loth to interfere. *Secus*, where there is a mere power to sell as in *Boyd* v. *Allen* (24 Ch. D. 622). In *Swaine* v. *Denby* (14 Ch. D. 326) the trust for sale which the Court refused to anticipate was to take place after the deaths of two tenants in common, one of whom still survived.

Sect. 3.

In a sale under sect. 3 of the Act of 1868 the Court "may if it thinks fit, on the request of any of the parties interested," order a sale if "beneficial," (*a*) "by reason of the nature of the property," or (*b*) "of the number of the parties interested," or (*c*) "of the absence or disability of some of those parties," or (*d*) "of any other circumstance." This discretion must be exercised far more carefully than that exercised for the purposes of sect. 4; so that all the restrictions and limitations on its exercise for the purposes of sect. 4 apply *à fortiori* to the present case. In *In re Dyer* (33 W. R. 806), the Court refused an order for sale, although evidence was adduced that the property if not sold then might depreciate, and there were parties under disability. In *Drinkwater* v. *Ratcliffe* (20 Eq. 533), Jessel, M.R., had held that "beneficial" referred to £ *s.* *d.*, not to sentiment. "The meaning of the Legislature was," said Jessel, M.R., in *Gilbert* v. *Smith* (11 Ch. D. 81), "that when you see that the property is of such a character that it cannot be reasonably partitioned," then an order for sale should be made. In that case, where there were three houses divisible into sixteenths; in *Peters* v. *Bacon* (8 Eq. 125), where three houses were divisible among forty or more persons, some of whom were abroad; in *Sykes* v. *Schofield* (14 Ch. D. 629), where the property was divisible into one hundred and fortieths; and *Drinkwater* v. *Ratcliffe* (*ubi supra*), where a thirty-acre farm was divisible into thirty-sixths, a sale was ordered.

Shares of persons under disability.

Special provision is made by sect. 6 of the Act of 1876, where married women request a sale, or "undertake" to purchase. The request is statutory, like that under the *Fines and Recoveries Act*, *Wallace* v. *Greenwood* (16 Ch. D. 362); but the better practice is that she should sign an instruction to her solicitor to instruct counsel to prefer her request or undertaking: *Grange* v. *White* (18 Ch. D. 612). The same power is given to the next friend, guardian *ad litem*, or committee in lunacy of infants and lunatics respectively. But the Court exercises an independent discretion before acceding to requests—even under sect. 4—of infants and lunatics. The obligation on the Court to satisfy itself that the sale is for the benefit of the lunatic (whether found or not so found) arises under case-law: *Porter* v. *P.* (37 Ch. D. 420), distinguishing *Halfhide* v. *Robinson* (9 Ch. 373). The obligation in the case of infants is expressed by this section, and is therefore statutory, *Rimington* v. *Hartley* (14 Ch. D. 630); *Willis* v. *W.* (38 W. R. 7); *Miles* v. *Jarvis* (50 L. T. 48); *Davis* v. *Ingram* ([1897] 1 Ch. 477) (Order). Both obligations are, however, derived from the doctrine that the Lord Chancellor is guardian of infants and lunatics, a jurisdiction recently discussed in *In re Sefton* (*Earl*) ([1898] 2 Ch. 378). Trustees represent their *c.q.t.* in a partition action: *Simpson* v. *Denny* (10 Ch. D. 28). It was held in *Strugnell* v. *S.* (27 Ch. D. 258), that where some of the beneficiaries are not *sui juris*, and the trustees have no power of sale under their trust deed, the Court cannot order a sale out of Court.

Effect of such shares being sold.

When sale is made at the request of a married woman or trustee or person *sui juris*, and the purchase-money is paid to them, realty is converted into personalty: *secus* (probably) when infants and lunatics request; see *post*, pp. 152, 153.

Mode of conveyance of such shares.

The shares of persons not in *esse* or abroad or under disability are under an order for sale conveyed by means of a vesting order, under sects. 25 *et seq.* of the *Trustee Act*, 1893 (sect. 7 of the Act of 1868); *Beckett* v. *Sutton* (19 Ch. D. 646); *Caswell* v. *Sheen* (69 L. T. 854); *In re Montagu* ([1896] 1 Ch. 549); *Davis* v. *Ingram* (*supra*).

Parties.

The rule is that the Court cannot make an order for sale at the hearing, unless all parties interested are parties to the action: *Mildmay* v. *Quicke* (20 Eq. 537), and see R. S. C., 1883, O. LI., r. 1 *a*. The utmost that can be done if they are not all present is "to give liberty to apply at Chambers with reference to a sale, in the event of its being certified that all parties interested had been either parties to the cause, or had been served with notice of" the order or judgment (*ib.*). Mortgagees of shares, as we have seen, and lessees, *Mason* v. *Keays* (78 L. T. 33), are "interested parties."

Where an order is made under sect. 4 it is the practice to order an inquiry in Chambers as to the title of plaintiffs to the moiety; but this is not necessary in simple cases: *Wood* v. *Gregory* (43 Ch. D. 82)†.

For the order in similar cases under sect. 3, *Peters* v. *Bacon* (8 Eq. 125); *Sykes* v. *Schofield* (14 Ch. D. 629; Seton, 5th ed. p. 1537).

Under Order XVI., r. 40, R. S. C., 1883, parties served with notice of judgment or order can attend proceedings under the judgment or order, and are as much bound as if they had been originally parties. The *Partition Act*, 1876, sect. 3, specifies the grounds upon which such service of notice may be dispensed with, viz. the impossibility of effecting services on all the persons who ought otherwise to be served, or of serving them except at an expense disproportionate to the value of the property; and sect. 4 provides for cases where orders thus dispensing with service are made; see *Phillips* v. *Andrews* (35 W. R. 266); *Rawlinson* v. *Miller* (1 Ch. D. 52); *Hurry* v. *H.* (10 Eq. 346); *In re Hardiman* (16 Ch. D. 360).

Costs.

Costs are paid out of the proceeds of sale: *Graham* v. *Clinton* (81 L. T. 717). In *Catton* v. *Banks* ([1893] 2 Ch. 221), followed in *Ancell* v. *Rolfe* ([1896] W. N. 9), and *In re Vase* ([1901] W. N. 124), there were three shares—one subject to one mortgage, a second to two mortgages, the third free. Only three sets of costs were allowed out of the entire estate, and the mortgagees got their costs in priority to the mortgagors. The effect therefore is that the owner of an incumbered share may have to pay his own costs in a partition action. But see *Belcher* v. *Williams* (45 Ch. D. 510). The usual rule as to costs was stated thus by Jessel, M.R., in *Ball* v. *Kemp-Welch* (14 Ch. D. 512): "The costs must be taxed as between party and party. Solicitor and client costs are only allowed by consent of the parties;" and they were to be borne rateably by the different shares. Solicitor and client costs are not ordered for the mere reason that the case is very hard and well conducted: *Rivington* v. *Garden* ([1901] 1 Ch. 561)†. See, too, *Porter* v. *Lopes* (7 Ch. D. 367); *Richardson* v. *Feary* (39 Ch. D. 45).

Pleading.

The section of the Act of 1868 should be pleaded: but leave to substitute another section was granted in *Evans* v. *E.* (31 W. R. 495).

See, generally, Foster on Joint Ownership and Partition.

Conversion by the Court, by Trustees, Partners, etc.

STEED *v.* PREECE.

(L. R. 18 Eq. 192.)

Principle.

When a conversion is rightly made either by the Court or a trustee, all the consequences of conversion must follow unless there be an equity in favour of reconversion.

Summary of facts.

Real estate had been conveyed to trustees in trust for two infants, J. Preece and E. Preece, as tenants in common in tail with cross remainders between them. A suit was instituted for administration of the trusts, a decree for sale made, the estate sold, and the purchase money paid into Court. Half of the fund in Court was paid to J. Preece, who had attained his majority, and the other half was carried over to the separate account of E. Preece. On the death of E. Preece, an infant and without issue, J. Preece executed a disentailing deed and presented a petition to have the money paid to him. Held, that the real estate was converted into personalty, and that E. Preece's legal personal representative was entitled to it.

Three leading cases.

This case forms a third point of departure in the elaboration of the doctrine of conversion, the two first principles of which were settled by *Fletcher* v. *Ashburner* (1 W. & T. L. C. 327) [1779]* and *Ackroyd* v. *Smithson* (*ib.* 372) [1780]* in which Lord Eldon, then John Scott, made his celebrated argument. "Mr. Scott," said one of the judges, when soon after he attempted to argue the reverse doctrine, "I have read your argument in that case of *Ackroyd* v. *Smithson*, and I defy you or any man in England to answer it. I won't hear you!" (Campbell's Lives of the Chancellors, vol. vii. p. 56.)

Fletcher v. *Ashburner*, according to *A.-G.* v. *Hubbuck* (13 Q. B. D. 275, *Fletcher* v. *Ashburner.*

Ackroyd v. *Smithson.*

289), decided "that when money is directed or agreed to be turned into land, or land agreed or directed to be turned into money, equity will treat that which is agreed to be or which ought to be done as done already, and impresses upon the property that species of character for the purpose of devolution and title into which it is bound ultimately to be converted." *Ackroyd* v. *Smithson* carried the doctrine one step further. In *Ackroyd* v. *Smithson* a testator, after giving certain legacies, ordered his real and personal estate to be sold, his debts and legacies to be paid out of the proceeds, and the residue to be given to certain legatees. Two of the legatees died in the lifetime of the testator, and the shares so lapsed went, so far as they consisted of personal estate, to the next of kin, and so far as they consisted of real estate to the heir-at-law. The effect of the case was stated by Jessel, M.R., in *Steed* v. *Preece*: "All that *Ackroyd* v. *Smithson* decided was, that a conversion directed by a testator is a conversion only for the purposes of the will, and that all that is not wanted for these purposes must go to the person who would have been entitled but for the will. It does not decide that if the Court or a trustee sell more than is necessary there is an equity to reconvert the surplus for the benefit of the heir-at-law of the persons entitled at the time of the sale."

Steed v. *Preece.*

A third step was taken in the l.c. in which a case decided in 1768 was preferred to *Jermy* v. *Preston* (13 Si. 356); *Cooke* v. *Dealey* (22 B. 196). Its principle was described in *Foster* v. *F.* (1 Ch. D. 588) thus: "If a conversion is rightly made, whether by the Court or a trustee, all the consequences of conversion must follow, if there be no equity in favour of the heir or any one else for reconversion." It was followed in *Arnold* v. *Dixon* (19 Eq. 113) and in *Hyett* v. *Mekin* (25 Ch. D. 735), where Kay, J., held "that if in an action for administration of an estate the Court, in the exercise of its undoubted jurisdiction, makes an order for the sale of the estate, the order for sale will amount in itself to a conversion," and in *Hartley* v. *Pendarves* ([1901] 2 Ch. 498).

Effect of conversion in Revenue cases.

Conversion means conversion for purposes of probate, *In the Goods of Gunn* (9 P. D. 242), cited in *A.-G.* v. *Marquis of Ailesbury* (12 A. C. 672, 696)*, of probate and account duty, *A.-G.* v. *Brunning* (8 H. L. C. 243); *A.-G.* v. *Hubbuck; A.-G.* v. *Marquis of Ailesbury; A.-G.* v. *Dodd* ([1894] 2 Q. B. 150), and legacy duty, *Forbes* v. *Steven* (10 Eq. 178), even where conversion arises from a trust to sell with power to postpone, *In the Goods of Gunn*, or at request of life tenant, *A.-G.* v. *Dodd*, distinguishing *In re Taylor's S.* (9 Ha. 596), from a contract subject to the Court, *A.-G.* v. *Brunning*, from a partnership abroad, etc., *Forbes* v. *Steven; A.-G.* v. *Hubbuck*, or from the doctrine as to persons under disability: *A.-G.* v. *Marquis of Ailesbury*. So with trusts to reconvert: *In the Goods of Gardiner* (9 P. D. 66).

Trusts for conversion.

A power to sell *plus* a trust to reinvest in land converts the proceeds of sale into freehold even though the lands include leaseholds: *In re Bird* ([1892] 1 Ch. 279); contrast *Atwell* v. *A.* (13 Eq. 23). A trust to sell at request, *A.-G.* v. *Dodd*, or at discretion, *In re Raw* (26

Ch. D. 601); *In re Heathcote* (58 L. T. 43), effects immediate conversion; contrast *In re Wintle* (65 L. J. Ch. 863); *In re Hotchkys* (32 Ch. D. 408); *McGwire* v. *M.* ([1900] 1 Ir. R. 200). *Ramsay* v. *Shelmerdine* (1 Eq. 129); *Spencer* v. *Wilson* (16 Eq. 501); *Walrond* v. *Rosslyn* (11 Ch. D. 640); *In re Newberry's T.* (5 Ch. D. 746) merely illustrate the old maxim that unless some one has an equity under the will or settlement to change the nature of the property equity will not convert it.

Rights of heir and next of kin where there is a resulting trust.

It was held in *In re Richerson* ([1892] 1 Ch. 379)†, that where realty is devised upon trust to sell and hold the proceeds of sale upon trusts, some of which fail, there is a resulting trust both of the proceeds of sale and of the unsold land in favour of the heir; but the latter takes both the land and the proceeds of sale as personalty. *Curteis* v. *Wormald* (10 Ch. D. 172) was the exact counterpart of this case. There it was held that where personalty was bequeathed upon trust to buy and hold land upon trusts, some of which failed, the land so bought resulted to the next of kin of the testator, but as realty. In these two cases the heir and next of kin respectively were not entitled to "an equity to reconvert" the personalty and realty which they took respectively. Compare *Frewen* v. *F.* (10 Ch. 610). They had to take the property as they found it, or would have found it had the trustees done their duty. In cases of total failure of the trusts it is the duty of the trustees not to convert, therefore the heir will take proceeds of realty unnecessarily sold as realty: *Davenport* v. *Coltman* (12 Si. 610); *Cooke* v. *Dealey* (22 B. 196).

Rights of devisee and legatee under residuary dispositions.

It was held in *Chandler* v. *Pocock* (16 Ch. D. 648) that a residuary bequest was under sect. 27 of the *Wills Act*, 1837, an exercise of a general power of appointment over property which, although personalty at the testator's death, was at the same date equitably converted. In this case conversion could only be effected with the appointor's consent. Compare *In re Harman* ([1894] 3 Ch. 607), a case under the *S. E. Act*, 1877, s. 34. In *In re Duke of Cleveland's S.E.* ([1893] 3 Ch. 244)† there was both a residuary devise and residuary bequest, besides a devise of lands in Staffordshire. It was held, following *In re Greaves' S. T.* (23 Ch. D. 313), that money produced by the sale of lands in Staffordshire and held upon trust to reinvest in land passed under the residuary devise.

The trust must be valid,

The trust must be valid. In *In re Daveron* ([1893] 3 Ch. 421) and *Goodier* v. *Edmunds* ([1893] 3 Ch. 455) a trust for sale of realty was void as infringing the rule against perpetuities; but unlike the case of *In re Wood* ([1894] 3 Ch. 381), the trust for sale was construed as separable from the trust of the proceeds of sale, and the trust of the proceeds took effect as a limitation of unconverted realty. North, J., in *In re Piercy* ([1895] 1 Ch. 83) construed an unenforceable imperative trust to sell Italian land as a power.

or the contract must be valid.

Where conversion arises from contract, the contract must be enforceable against intestate, etc., at the date of his death: *A.-G.* v. *Hubbuck* (13 Q. B. D. 291). Thus, "if the title was in such a state at the time of his death that the purchaser was entitled to refuse the estate, then there was not a valid contract to sell;" *In re Thomas* (34 C. D. 166), citing *Lysaght* v. *Edwards* (2 Ch. D. 499); if vendor reserved an option to rescind which he exercised after purchaser's death, there is conversion: *Hudson* v. *Cook* (13 Eq. 417).

Conversion of partnership property.

The rule that partnership land is converted is thus explained in *Darby* v. *D.* (3 Drew. 495*, cited 4 Ch. 609, 10 Q. B. D. 497).

"If partners purchase land merely for the purpose of their trade and pay for it out of the partnership property, that transaction makes the property personalty, and effects a conversion out and out. What is the clear principle of this Court as to the law of partnership? It is that on the dissolution of the partnership all the property belonging to the partnership shall be sold, and the proceeds of the sale, after discharging all the partnership debts and liabilities, shall be divided among the partners according to their respective shares in the capital. That is the general rule, and it requires no special stipulation; it is inherent in the very contract of partnership." Compare James L.J.'s judgment in *Waterer* v. *W.* (15 Eq. 402), "where property became involved in partnership dealings it must be regarded as partnership property. It seems to me immaterial how it may have been acquired, whether by descent or devise, if, in fact, it was substantially involved in the business." This principle is now embodied in the *Partnership Act*, 1890, s. 22:

"Where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner) and also as between the heirs of a deceased partner and his executors and administrators as personal or moveable and not real or heritable estate."

Where the partners are only co-owners of realty under sect. 20, sub-sect. 3 of the same Act, conversion, "in the absence of an agreement to the contrary," does not ensue.

The old cases distinguishing between co-owners and partners are still in force. Land speculators, *In re Hulton* (62 L. T. 200) (following *Darby* v. *D.* (*supra*)), nurserymen, *Waterer* v. *W.* (*supra*), and farmers, *Davies* v. *Games* (12 Ch. D. 813), are partners. In *In re Wilson* ([1893] 2 Ch. 340), one land speculation was held to create co-ownership. In *Davis* v. *D.* ([1894] 1 Ch. 393), the partners kept their co-owned land separate. In *Steward* v. *Blakeway* (4 Ch. 603), the co-owners were partners as to their quarries, but conveyed the land which they bought for this purpose to trustees, and treated it as land. *In re Wilson* and *Steward* v. *Blakeway* have a family likeness to the cases mentioned. *Ante*, pp. 39, 40.

Reconversion in case of absolute owners. Election.

Election by the beneficiary to take the property as unconverted is defined thus in *In re Lewis* (30 Ch. D. 654) (where, however, there was no conversion): "Whenever real estate has been converted into personalty, or according to the doctrine of a Court of Equity is to be treated as having been converted into personalty, it must then descend as personalty unless some person who is absolutely entitled to it has shown in some way that he has elected to take it as real estate. Almost anything will be enough to show such an intention, but there must be something." Election took place in *Mutlow* v. *Bigg* (1 Ch. D. 385) and *In re Gordon* (6 Ch. D. 531), where remaining in possession and receiving the rents for nine years without taking any steps to have the estate sold was regarded as sufficient evidence of an election to take the property as real estate. In *Meek* v. *Devenish* (6 Ch. D. 566) the election signified by a person while contingently entitled was held valid on the contingency occurring. In *In re Davidson* (11 Ch. D. 341) the elector was a married woman entitled to the property to her separate use.

All the parties entitled must elect: *Sisson* v. *Giles* (3 D. J. & S. 614); *In re Heathcote* (*supra*).

Reconversion in cases of persons under disability.

Payments into Court of the purchase money of freeholds sold under sect. 69 of the *Lands Clauses Act*, 1845, or under sect. 8 of the Partition Act, 1868, are impressed with a trust for reconversion, unless, or until, they can be paid out to a person absolutely entitled, or, since 1882, "empowered to give an absolute discharge." This equity is statutory. Thus infants' money so paid in is to all intents and purposes land: *Foster* v. *F.* (1 Ch. D. 588); *Kelland* v. *Fulford* (6 Ch. D. 491); *Mordaunt* v. *Benwell* (19 Ch. D. 302); *Howard* v. *Jalland* ([1891] W. N. 210); *In re Norton* ([1900] 1 Ch. 101). In *Wallace* v. *Greenwood* (*post*), Jessel, M.R., stated the law thus:—"Where the Court has power to sell an infant's real estate and orders it to be sold, the order operates as a conversion, and the estate then becomes personalty." But "it is the practice of the Court to provide against the consequences of conversion," *e.g.* by declaring the land bought subject to a charge in favour of the infant's personalty. See Seton, 5th ed. p. 869. The practice of the Court reconverted what the law converted.

So, too, with a lunatic's money improperly paid in *In re Barker* (17 Ch. D. 241); *In re Tugwell* (27 Ch. D. 309); a description, which does not include money paid under voidable contracts by the lunatic, adopted by the Lunacy authorities, *Baldwyn* v. *Smith* ([1900] 1 Ch. 588), nor the proceeds of ordinary management, *e.g.* timber sales by the Court: *Hartley* v. *Pendarves* ([1901] 2 Ch. 498). Lunatics' money arising from sales and mortgages must be paid in to his credit as freeholds, just as freeholds bought for him are conveyed to him, his executors, and administrators: *A.-G.* v. *Marquis Ailesbury* (12 A. C. 672); Lunacy Act, 1890, s. 123. And reconversion so effected is reconversion for all purposes. The money of a married woman subject to the old law was also unconverted, *Mildmay* v. *Quicke* (6 Ch. D. 553), unless she elected to take it as money after a separate examination in Court, *Standering* v. *Hall* (11 Ch. D. 652), an examination which might be dispensed with in the case of small sums: *Wallace* v. *Greenwood* (16 Ch. D. 362). In this case Jessel, M.R., held that if she specially authorized a person to request a sale, under the powers contained in the Partition Act, 1876, s. 6, there would be no reconversion. On this last point, Jessel's, M.R., *dicta* seem to apply to a request by the guardian of an infant as well as to married women; but it is certain that in this case the Court would order reconversion: *Rimington* v. *Hartley* (14 Ch. D. 630); *In re Norton* (*supra*). The power of the Court to pay such money out to trustees, with power or trust to sell, is discretionary: *In re Smith* (40 Ch. D. 386); but has been upheld even before 1882, when the law was altered, *ib.* p. 392, citing *In re Hobson's T.* (7 Ch. D. 708); *In re Morgan* ([1900] 2 Ch. 474). When paid out, the equity for reconversion is at an end, and the trustees hold it on the trusts of the settlement (*post*, p. 307).

Limited owners.

The *S. L. Act*, 1882, declares the proceeds of sale of land, etc., sold by limited owners to be subject to the same trusts and provisions as the land, etc., sold (sect. 21, 22). This section, while not directing reconversion in express terms, assumes that reconversion takes place. Section 32 makes payments under the Lands' Clauses Acts and Partition Acts subject to these sections. See *ante*, pp. 138, 139.

Date of conversion.

In an administration action the property is converted from the date of the order: *Hyett* v. *Mekin* (*ubi supra*); in a sale under sect. 78 of the *Lands Clauses*, 1845, from the date when the price is fixed and the contract complete: *Watts* v. *W.* (17 Eq. 217); *Ex p. Hawkins* (13 Sim. 569); Fry, Sp. P. (sect. 132); in a deed from the date thereof; in a will from the date of testator's death. A peculiar rule according to *Lawes* v. *Bennett* (1 Cox, 167) applies to freeholds let to a tenant who has an option to purchase his tenancy either after or before the lessor's death. When the option is exercised it operates as a conversion as from the date of the lease, and as between lessor's real and personal representatives, but with one exception; mesne profits between the lessor's death and the exercise of the option are treated as the profits of unconverted realty and are payable to the heir or devisee. This rule applies to intestates as well as to testators, *In re Isaacs* ([1894] 3 Ch. 506),† and is excluded by the expression of an intention to the contrary, *In re Pyle* ([1895] 1 Ch. 724), following *Emuss* v. *Smith* (2 De G. & S. 722). "In *Edwards* v. *West* (7 Ch. D. 858)† it was attempted to extend the principle of *Lawes* v. *Bennett* to the person exercising the option, *Lawes* v. *Bennett* only having decided as regards the party giving the option," per Baggallay, L.J., in *In re Adams and Kensington Vestry* (27 Ch. D. 394); but it was held that this was fallacious. Compare *Raffety* v. *Schofield* ([1897] 1 Ch. 937).

Conversion of Wasting Securities.

MACDONALD *v.* IRVINE.

(8 Ch. D. 101.)

Principle.

The rule of Howe *v.* Earl of Dartmouth *is to be applied unless there is a sufficient indication of intention against it. The burden of proof in every case rests upon the person who says it is not to be applied.*

Summary of facts.

A testator, after specifically bequeathing leaseholds, etc., gave the residue of his estate, "including my furniture" and consisting, *inter alia*, of "Khedive Bonds" and a policy, to his nephew. Afterwards he married, and made a codicil, by which he gave to his wife for her life "all the income dividends and annual proceeds of his entire estate, and postponed the payment of all legacies and the distribution of all estates vested in him, or over which he had any power of disposition or appointment until after her decease," and subject thereto revived and confirmed his will.

The C. A. held that the leaseholds must not, but the residuary estate (including the furniture and bonds) must be converted, and that the premiums must be charged on the policy in accordance with the rule in *Howe* v. *Earl of Dartmouth.*

Rule of *Howe* v. *Earl of Dartmouth.*

Efforts had been made to seize the smallest indications for evading the rule in *Howe* v. *Earl of Dartmouth* (1 W. & T. L. C. 68)*. See *Chambers* v. *C.* (15 Si. 183); *Craig* v. *Wheeler* (29 L. J. Ch. 374); *Blann* v. *Bell* (2 D. M. & G. 775). The l.c. and *Brown* v. *Gellatly* (2 Ch. 751)* re-established its authority. The rule only applies to gifts of residue by will, not, *e.g.*, to the leaseholds in the l.c., nor to gifts by deed: *In re Van Straubenzee* ([1901] 2 Ch. 779). It was defined thus in the l.c. (p. 121): "Where personal estate is given in terms amounting to a general residuary bequest, to be enjoyed by persons in succession, such persons are to enjoy the same thing in succession, and accordingly the Court effectuates the presumed intention of the testator by the conversion into investments approved by the Court of so much of the personalty as is at the death of the testator of a wasting, or perishable, or insecure nature, and also of reversionary interests." "If," said James, L.J., "the testator had simply inserted in the will as the first gift, 'I give to my wife the income, dividends, and annual produce of my entire estate,' I think that would not have been, according to the fair construction of the decided cases, any indication of an intention that she was to have anything more than the income, dividends, and annual produce of the whole of the estate, that is to say, of that which would remain of the estate after the debts, funeral and testamentary expenses had been paid, and the property had been converted and properly dealt with according to the duties imposed upon his legal personal representatives. The other words, that he postponed the payment of all legacies, the distribution of all estates vested in him or over which he had a power of disposition, until after her decease, meant nothing more than that he intended the life estate of his wife to be paramount to any gift however clear and specific." Will and codicil taken together were therefore not sufficient to indicate an intention to take the case out of the ordinary rule of conversion; which rule "must be applied unless upon the fair construction of the will you find a sufficient indication of intention that it is not to be applied, the burden in every case being upon the person who says the rule of the Court of Chancery ought not to be applied in the particular case" (p. 125).

Three varieties of the rule.

The rule is applied differently in the case of (1) authorized wasting securities or (2) reversions; (3) and securities unauthorized by settlor or statute.

1. Rule as to authorized wasting securities.

1. Wasting securities include furniture, bonds above par and redeemable at par, l.c. and *In re Thomas* ([1891] 3 Ch. 482), business, *Brown* v. *Gellatly* (2 Ch. 751)*, annuities, *Tickner* v. *Old* (18 Eq. 422); *Porter* v. *Baddeley* (5 Ch. D. 542); *In re Whitehead* ([1894] 1 Ch. 678), leaseholds, *In re Game* ([1897] 1 Ch. 881)†.

In the following illustrations there was a duty or trust to sell, ample power to postpone sale, yet there was no gift of mesne income until sale; therefore the assets were convertible. T. = testator, E. = tenant for life, G. = remainderman, A. B. C = trustee-executors, B. C. = trustees.

Cases where the rule was applied.

(1) A. B. C. may convert the residue "when and in such manner as they see fit," and "sail my ships for the benefit of my estate until they can be satisfactorily sold." E. is therefore only entitled to "equitable interest" (see note) on their value at T.'s death: *Brown* v. *Gellatly* (2 Ch. 751)*, following *Meyer* v. *Simonsen* (5 D. & S. 723); *Fearns* v. *Young* (9 Ves. 549).

(2) A direction to convert is unnecessary: *Morgan* v. *M.* (14 B. 83); *Johnson* v. *J.* (2 Coll. 441); *In re Shaw's T.* (12 Eq. 124).

(3) A residuary clause specifying "all my leaseholds" is residuary as regards leaseholds, etc., *Mills* v. *M.* (7 Sim. 501), or "my furniture," l.c., or "all my long annuities," *Sutherland* v. *Cooke* (1 Coll. 498), the "entire" income, l.c. and *Chambers* v. *C.* (15 Si. 183). See *In re Green* (40 Ch. D. 610), (13) and (14).

(4) T. having or expecting to have freeholds and leaseholds, leaves "rents and profits of residue" to E.: *In re Game* ([1897] 1 Ch. 881)†; *Pickup* v. *Anderson* (4 Ha. 624); *In re Carter* (41 W. R. 140); *Pickering* v. *P.* (4 M. & C. 289); *Craig* v. *Wheeler* (29 L. J. Ch. 374).

(5) T. leaves his "real and personal" property to E., then his "real and personal property" to G.: *Jebb* v. *Tugwell* (20 B. 84); *Craig* v. *Wheeler* (29 L. J. Ch. 374).

A gift of mesne income is implied, and the property is not convertible as between E. and G.;—

Cases where the rule was excluded.

(6) In case of realty: *In re Laing's T.* (1 Eq. 416); *Hope* v. *D'Hédouville* ([1893] 2 Ch. 361); *In re Searle* ([1900] 2 Ch. 829)†.

(7) "There is no case where it" (*Howe* v. *Dartmouth*) "has been applied to a case which is vested but liable to be divested," *e.g.* by death without issue: per Stirling, J., *In re Hammersley* (81 L. T. 150), *In re Bland* ([1899] 2 Ch. 336).

(8) The usual trust to pay profits as the income of investments representing the proceeds of sale of the business would be payable enabled E. to enjoy the profits twenty-two years in *In re Crowther* ([1895] 2 Ch. 56); *In re Chancellor* (26 Ch. D. 42), or until the business expired, *Miller* v. *M.* (13 Eq. 263); *Johnston* v. *Moore* (27 L. J. Ch. 453).

(9) In a trust to hold investments "for the time being constituting" his residue and to pay the income thereof to E.; "thereof" includes businesses, etc., properly retained: *In re Thomas* ([1891] 3 Ch. 482).

(10) Words as in (1), but with a direction not to sell for seven years, *Green* v. *Britten* (1 D. J. & S. 649, cited in (1)), *Skirving* v. *Williams* (24 B. 275) (?), or without the consent of all parties, *Hinves* v. *H.* (3 Ha. 609), or to sell in an event which has not happened yet: *Daniel* v. *Warren* (2 Y. & C. C. C. 290); *Hunt* v. *Scott* (1 D. & S. 219) (?); *Alcock* v. *Sloper* (2 M. & K. 699).

(11) In a trust to sell "if and when" or "such parts as" they may think fit for paying debts: *In re Sewell's E.* (11 Eq. 80); *In re Leonard* (29 W. R. 234), *Gray* v. *Siggers* (15 Ch. D. 74) (?). See (18).

(12) T., "notwithstanding the devise and bequest of his freehold and leasehold estates" to E. and G., gave powers of sale over "any of them at any time:" *Burton* v. *Mount* (2 D. & S. 383); *Simpson* v. *Lester* (13).

(13) T. gives his leaseholds and long annuities "with the residue," *Vaughan* v. *Buck* (1 Ph. 75), all his real and personal property, "including my mining property," with power to sell "all or any part" of his said real and personal estates, *Simpson* v. *Lester* (4 Jur. N. S. 1269), "all I possess in the funds copy or leasehold estates,"

Bethune v. *Kennedy* (1 M. & C. 114), following *Collins* v. *C.* (2 M. & K. 703). See (3).

(14) T. gives all his stock or government securities—he only has annuities—to E., then G.: *Vincent* v. *Newcombe* (1 T. 599); *Lord* v. *Godfrey* (4 Mad. 455); *Howard* v. *Kay* (27 L. J. Ch. 448); *Wilday* v. *Sandys* (7 Eq. 455).

(15) Or his "rents," and he only has leaseholds: *Bowden* v. *B.* (17 Si. 65); *Goodenough* v. *Tremamondo* (2 B. 512), cited in *In re Game* (4). If he devises freeholds also, see *Vachell* v. *Roberts* (32 B. 140); *Wearing* v. *W.* (23 B. 99), as cited in *In re Game* (4).

(16) Or his "rents," coupled with other references to his leaseholds, *e.g.* powers of management: *Cafe* v. *Bent* (5 Ha. 24); *Crowe* v. *Crisford* (17 B. 507); *Thursby* v. *T.* (19 Eq. 395); *Harris* v. *Poyner* (1 Dr. 174) ("term"); *Holgate* v. *Jennings* (24 B. 623).

(17) Or "his rents" coupled with enumeration as in (13) *Blann* v. *Bell* (2 D. M. & G. 775), C. A.; *Hood* v. *Clapham* (19 B. 90).

2. Rule as to reversions applied,

2. Where the rule is applicable or excluded for the above purposes it is applicable or excluded in cases of reversionary interests, *i.e.* if excluded E. is entitled to nothing while the interest is reversionary: *Rowlls* v. *Bebb* ([1900] 2 Ch. 107, 114), approving *Mackie* v. *M.* (5 Ha. 70). The order in case (1) has often been adapted to the apportionment of losses: *In re Morley* ([1895] 2 Ch. 738); *In re Hubbuck* ([1896] 1 Ch. 754); or profits or losses: *In re Hengler* ([1893] 1 Ch. 586); it is similarly adapted to reversionary interests: *In re Chesterfield's T.* (24 Ch. D. 643); *In re Morley*; *In re Hubbuck*; *In re Goodenough* ([1895] 2 Ch. 537); *In re Flower* (62 L. T. 216). The order as to the policy in the l.c. was only provisional. The rule was excluded by—

and excluded.

(18) A trust to sell "if and when" they think fit: *In re Pitcairn* ([1896] 2 Ch. 199); see (11).

(19) Coupled with a trust "to permit" E. to receive the income (*ib.*), comparing *Alcock* v. *Sloper*, cited in (10); but see *In re Llewellyn's T.* (29 B. 171); *In re Eaton* (70 L. T. 761).

(20) In *Rowlls* v. *Bebb* the C. A. held that A. B. C. exercised no discretion when they abstained from converting. That being so, the reversion became an unauthorized investment (see below). Their reason for this inference was that there were no wasting assets to set off against the idle assets; but this reason would be inapplicable to wasting assets. And further, it would render the retention of reversionary interests impossible in cases where it would have been right to retain wasting assets.

3. Rule as to permanent unauthorized securities.

3. As to investments authorized neither by T. nor by statute:—

(21) E. takes as from T.'s death interest only on so much consols as the amount, which would have been realized by the sale of the unauthorized investments at the end of a year after T.'s death, would have bought if then so applied: *Brown* v. *Gellatly*, following *Dimes* v. *Scott* (4 Russ. 195); *Taylor* v. *Clark* (1 Ha. 161); *Thornton* v. *Ellis* (15 B. 193); *Caldecott* v. *C.* (1 Y. & C. C. C. 312, 737). In *In*

re Eaton (70 L. T. 761), this third class of cases is confused with the first class. This order has also been made in cases belonging to the first class; *e.g.* in *In re Llewellyn's T.* (*supra*).

(22) If A. B. C. are authorized to retain T.'s investments, E. enjoys their income in specie, although they are not otherwise authorized by the will or by statute: *In re Sheldon* (39 Ch. D. 50).

Note.—*Equitable Interest.*

Interest.

Equitable interest means what the residuary estate would probably have brought in if it had been duly sold and invested: *Wentworth* v. *W.* ([1900] A. C. 163). Down to 1895 it was in England 4 per cent. (*ib.*). Then Kekewich, J., fixed it at 3 per cent., *In re Goodenough* ([1895] 2 Ch. 537), a lead which the Court of Appeal has followed: *Rowlls* v. *Bebb*. Three per cent. is also charged in orders to refund: *In re Barclay* ([1899] 1 Ch. 686), although wilful default incurs 5 per cent. interest (*ib.*). Legacies still carry 4 per cent., R. S. O. 55, r. 64: *Wassell* v. *Leggatt* ([1896] 1 Ch. 554); *Rowlls* v. *Bebb* (p. 118); and advancement, *In re Dallmeyer* ([1896] 1 Ch. 372), except by consent, *In re Lambert* ([1897] 2 Ch. 169). Judgments carry 4 per cent. interest under 1 & 2 Vict. c. 110, s. 17. Interest on deposits, purchase money, etc., seems still to carry 4 per cent. interest: see *post*, p. 333.

Discretionary Trusts.

GISBORNE *v.* GISBORNE.

(2 App. Cas. 300.)

Principle.

Where an absolute discretion is conferred on trustees as to the mode of executing a trust, the Court will not interfere with their discretion unless exercised malâ fide *or in a way incompatible with the trust.*

Summary of facts.

An Order in Lunacy had been made to pay £696 per annum for the maintenance of a lady who was absolutely entitled to a fund which produced about £600 per annum. A second fund had been left to trustees upon trust, "in their discretion and of their uncontrollable authority," to apply "the whole or such portion only of the annual income as they shall deem expedient" for her maintenance. The second fund, together with so much of the income as was not applied for her benefit, passed over to other persons on her decease. The question was on which fund the £696 per annum should be charged. Held, by the House of Lords, that the trustees were entitled to exercise an absolute discretion as to paying and applying the whole or any part of the income of the second fund for the benefit of the lunatic; and it was declared, with the consent of the trustees, that the income of the second fund was only liable to make good the deficiencies of the first fund.

Discretionary trusts defined.

Discretionary trust is used in three senses: (1) a power plus a trust, as where settlor (S) in one confused sentence gives donee (D) power to select, and in cases of non-selection makes him trustee for the objects (O). Power and trust are distinct. The trust is one usually for maintenance: *In re Booth* ([1894] 2 Ch. 282); *Williams* v. *Papworth* ([1900] A. C. 563); contrast *In re Coleman* (39 Ch. D. 443); *In re Stanger* (64 L. T. 693), or advancement, *In re Johnston* ([1894] 3 Ch. 204)†, of children at discretion of trustees; but more informal words have sufficed: *In re Weeke's S.* ([1897] 1 Ch. 289)†; *In re Hall* ([1899] 1 Ir. R. 308). (2) A trust-power, or a power coupled with a trust or wish that D should play moral censor over O: *Weller* v. *Kerr* (L. R. 1 Sc. A. 11); *In re Eyre* (49 L. T. 259), or protect O's life interest against creditors: *Saul* v. *Pattinson* (34 W. R. 561). Here D has a duty not to release the power, and cannot release it by statute (C. A., 1881, s. 52), contract, nor estoppel (*ib.*). Further, if in a will there is no gift over in case O do not take, nor any precatory nor secret trust for O (pp. 16, 20), yet D cannot take beneficially: *Briggs* v. *Penny* (3 M. & G. 546); *Bernard* v. *Minshull* (Johns 276). (3) A power-trust, or trust coupled with a power as in the l.c. Such trusts are not only indestructible, but must be exercised. Yet the Court will not enforce these trusts so as to defeat the power, unless the power is being used so as to defeat the trusts. "When a testator has given a pure discretion to trustees as to the exercise of a power" (briefly, a power), "the Court does not enforce the exercise of the power against the wish of the trustees, but it does prevent them from exercising it improperly. The Court says that the power, if exercised at all, is to be properly exercised. But in all cases where there is a trust or duty coupled with the power" (briefly, a discretionary trust), "the Court will then compel the trustee to carry it out in a proper manner, and within a reasonable time," per Jessel, M.R., in *Tempest* v. *Camoys* (21 Ch. D. 571, 578). *Gisborne* v. *G.* was described in *In re Lofthouse* (29 Ch. D. 921), as the turning point in the current of authority on these discretionary trusts. Here two discretions clashed: that of the Court in Lunacy to apply lunatic's funds for his maintenance as it "thinks most expedient" (*L. Act,* 1890, s. 117, re-enacting the old equity)—a discretion which has been used to baffle foreign judgments (p. 2), the Court of Bankruptcy (p. 55), and even the Poor Law, *Winkle* v. *Bailey* ([1897] 1 Ch. 123); *In re Watson* ([1899] 1 Ch. 72); *In re Tye* ([1900] 1 Ch. 249); *In re Taylor* ([1901] 1 Ch. 480),—and that of the trustee. The trustee used his discretion to maintain the lunatic out of her own property in the first instance, and to spare the fund in which her interest was "evanescent." The Court where it "has to exercise its discretion" proceeds upon an opposite plan. "But," continued Lord Cairns, "am I entitled, in dealing with a will such as is now before your Lordships, to set up against the discretion of the trustees, which is pronounced by this will to be uncontrolled and uncontrollable, the rule which the Court of Chancery adopts for the exercise of its own discretion in a similar or in an analogous case? To do so here would simply be to reverse the words used by the testator, and to say that the discretion which is given to the trustees by this will, and which is stated to be uncontrollable, shall be controlled and be subjected to that rigid and unbending rule upon which the Court of Chancery acts (for reasons of which I entirely approve), upon those occasions when it has to perform the functions which, in this instance, the trustees, and not the Court, have to perform." If the trustees had not exercised their discretion by giving the consent referred to in the order the second fund could not, in all probability, have been touched by the Court. But here the trustees seemed to have waived their discretion in favour of the discretion of the Court, as in *Collins* v. *Vining* (1 Cooper, C. P. 472); *In re Murphy's T.* ([1900] 1 Ir. Rep. 145); *Furley* v. *Hyder* (41 L. J. Ch. 583).

Usual practice as to maintenance of lunatics.

In *In re Weaver* (21 Ch. D. 615) precisely the same circumstances recurred; but the words were "upon trust to apply the same" (income) "in such way, at such times, and in such manner" (instead of "to apply the income or such part of it") as the trustees should think fit, so that the lunatic was entitled to the whole of the income of the settled fund, upon which his maintenance was therefore in the first instance charged.

Discretionary Trusts for maintenance of infants.

The Court will execute powers of granting maintenance to infants in case of necessity: *Maddison* v. *Andrew* (1 Ves. 60), being their guardian; and the principles with regard to infants and lunatics are the same so far as the construction of the maintenance clauses are concerned: *Costabadie* v. *C.* (6 Ha. 410); *In re Lofthouse* (29 C. D. 921). In *In re Walker* ([1901] 1 Ch. 879) testator allowed £500 a year, the Court £4000 a year to an infant's maintenance. The following were trusts to apply "the whole or such part of the income as they should think fit" for maintenance. In *Brophy* v. *Bellamy* (8 Ch. 798), the payment of the whole income to a rich parent, he undertaking to maintain the children, was upheld: comp. *In re De Hoghton* ([1896] 2 Ch. 397). In *In re Bryant* ([1894] 1 Ch. 324) the trustees did not apply any of the income towards maintenance. The Court based their refusal to interfere on the ground that the surviving parent had sufficient income of her own for their maintenance, and was maintaining them. It is presumed that if there had been no other fund the Court would have interfered. In *Tabor* v. *Brooks* (10 Ch. D. 273) the objects were Mr. and Mrs. Tabor and the children. The trustees paid almost all the income to Mr. Tabor, who was a drunkard and wife-beater. The wife, who lived apart from her husband, was nearly destitute. But the Court, though it disapproved of, refused to interfere with the discretion of the trustees.

In the following cases an opposite decision was arrived at: in *In re Hodges* (7 Ch. D. 754) the parents could not and the trustees would not properly maintain the children; but the reasons given by Malins, V.C., were incompatible with those in the l.c. and most other cases. In *Ransome* v. *Burgess* (3 Eq. 773) the words were as in *Gisborne* v. *G.* and the order as in *In re Weaver;* Kindersley, V.C., basing his decision on a supposed difference in the case of ante-nuptial settlements. But this case was disapproved of in *Wilson* v. *Turner* (22 Ch. D. 521, 525). In that case the trustees, misled by *Ransome* v. *Burgess* (see above), paid the whole income to the father, and there was no evidence that the father wished to maintain or maintained the child out of this fund, as he had other means of his own. This was held to be no exercise of a discretion, and the father's estate had to refund the moneys so advanced. Similar control was asserted by the Court in *In re Roper's T.* (11 Ch. D. 272), where the income was improperly paid to a mother living apart from her children.

In *In re Wise* ([1896] 1 Ch. 281) North, J., said that if the trustees "have a discretion which they do not exercise, the Court would exercise it for them." In view of *Wilson* v. *Turner* and *In re Roper's Trusts*, trustees ought not to pay unnecessary sums for maintenance without obtaining an undertaking, as in *Brophy* v. *Bellamy*, or some evidence that the money will be applied towards maintenance of the children.

Trusts to convert and invest, and power to postpone conversion and investment.

Similar questions arise with regard to investments. Thus a trust to sell at discretion, *In re Atkins* (81 L. T. 421), or coupled with a power to postpone sale, *In re Norrington* (13 Ch. D. 654), justifies a trustee in retaining risky securities handed over to him by the settlor. In this case the risky securities were shares in an unlimited liability company, and they were retained nine years, although the trustee was also executor, and executors are usually bound to sell the estate of their testator within a year. James, L.J., exonerated the trustee thus:—"The testator in this case has given to his trustees power to judge for themselves. They were to do what they thought best. The testator had invested his money as he thought best, and he had invested it in certain securities because he thought well of them. And he says in plain language: 'I have acted thus in the exercise of my discretion. My executors are to have the same discretion.' We should be making a will for the testator if we were to hold them liable for having acted as they have done."

On a similar question being raised on a similar provision in *In re Brown* (29 Ch. D. 889), Pearson, J., defined the position of the trustees thus: "The trustees have power to postpone the conversion, but the conversion ought not to be indefinitely postponed." In *In re Smith* ([1896] 1 Ch. 171) only two years' postponement was allowed, but there were words directing an immediate sale, as in *Sculthorpe* v. *Tipper* (13 Eq. 232), as cited in *In re Norrington.* In *In re Chancellor* (26 Ch. D. 42) two years, in *In re Atkins* three years were suggested as a reasonable limit to postponement. In *In re Crowther* ([1895] 2 Ch. 56) the judge did not disapprove of a postponement for twenty-two years, but in *In re Crowther* and *In re Chancellor* no question of loss was raised. See p. 175, rule 11. A purchaser may assume that executors have exercised or abandoned their power to sell realty charged with debts within twenty years: *In re Tanqueray-Willaume and Landau* (20 Ch. D. 465). This rule does not extend to chattels real, *In re Whistler* (35 Ch. D. 561); *In re Venn and Furze's C.* ([1894] 2 Ch. 101), nor, of course, does it apply to risky securities. If securities are risky trustees cannot be advised to retain them more than two or three years without an order from the Court.

Duty to convert or invest coupled with powers of postponement.

In *Tempest* v. *Lord Camoys* (21 Ch. D. 571)* there was a declaration (that is to say, a trust) that the trustees should, "at their absolute discretion," lay out the proceeds of sale of realty in purchasing other realty. Further, the trustees had the proceeds of sale of realty lying idle, so that there was an immediate duty to invest such proceeds. The Court refused to dictate any scheme to the trustees, although as yet the trustees had no scheme of their own; and Jessel, M.R., said that if the trustees "had refused to invest the money in land at all, the Court would have found no difficulty in interfering." As it was, the refusal of the trustees to buy that particular land at that particular time was well within their discretion (cited 45 Ch. D. 405).

In *In re Burrage* (62 L. T. 752) the power to sell at discretion was express, but the duty to sell and sell soon arose from the fact that the securities were wasting, and that the testator had settled the beneficial ownerships of his estate upon tenant for life and remainderman. Chitty, J., refused to enforce this duty, on the ground that the trustees, although they had postponed the sale, had acted fairly between the beneficiaries. As long as they did that they could choose their own time and manner of sale. Compare *In re Blake, post,* p. 323. Contrast *Nickisson* v. *Cockill* (3 D. J. & S. 622).

In *In re Courtier* (34 Ch. D. 136) there was only one surviving trustee, as in *Livesey* v. *Harding* (Tam. 460); *A.-G.* v. *Glegg* (Amb. 584), *Byam* v. *B.* (19 B. 65), and she was an interested party, as in *Stainton* v. *Carron* (18 B. 146); and she had an apparent duty to sell leaseholds, as the leaseholds had been allowed by testator to run to rack and ruin, and therefore the tenants for life were under no obligation to repair them. The Court would not admit the duty, nor interfere with her discretion. It is to be noted that in this case the tenant for life was expressly authorized to enjoy the leaseholds in specie, so that the argument urged in *In re Burrage* did not apply. And further, Cotton, L.J., intimated that if he could have construed the power as "part of a general trust for the management of the estate" (as to which see *Tempest* v. *Lord Camoys* (21 Ch. D. 576, n.)), he would have come to a different conclusion.

Corrupt motive.

In *In re Smith, Smith* v. *Thompson* ([1896] 1 Ch. 71), there was a power to invest upon "such" securities as the trustees "should think fit;" and one of the trustees accepted a secret commission for investing in a risky security. He had to replace the security (and refund the commission); the other trustee, who had acted honestly but injudiciously, incurred no liability. See pp. 139, 175.

Miscellaneous discretionary trusts,

The Court does not interfere with powers to appoint new trustees if the donee wishes to exercise the power: *Cecil* v. *Langdon* (28 C. D. 1); *In re Higginbottom* ([1892] 3 Ch. 132).

A discretionary trust to maintain bankrupt *or* his relations will justify payment to bankrupt for mere maintenance: *Ex p. Wreford* ([1892] 1 Q. B. 872); and see p. 58 (15); *In re Bullock* (64 L. T. 736); *Chambers* v. *Smith* (3 A. C. 795). A trust or power to advance coupled with a power to construe the word "advancement" does not authorize payment of the object's husband's debts: *Molyneaux* v. *Fletcher* ([1898] 1 Q. B. 648), citing *Talbot* v. *Marshfield* (3 Ch. 622), etc. A trust to sell with power to manage may imply a trust to mortgage land: *In re Bellinger* ([1898] 2 Ch. 534); *Stroughill* v. *Anstey* (1 D. M. & G. 635), *secus Walker* v. *Southall* (56 L. T. 882).

e.g. trusts to distribute;

A trust to distribute with or without power to sell implies wide powers of appropriating assets from time to time: *Austin* v. *Beddoe* ([1893] W. N. 78); *In re Lepine* ([1892] 1 Ch. 210); *In re Richardson* ([1896] 1 Ch. 512); *In re Nickels* ([1898] 1 Ch. 630) (settled shares); *In re Beverly* ([1901] 1 Ch. 681)† (realty).

e.g. rights of dismissal.

If you may dismiss masters at discretion, never give reasons: *Hayman* v. *Rugby School Governors* (18 Eq. 28), *Ex p. Holland* (11 Jur. 581). But if charges are made accused should be heard: *Willis* v. *Childe* (13 B. 117); *Fisher* v. *Jackson* ([1891] 2 Ch. 84). No reasons justify bad conclusions: *In re Beloved Wilkes' Charity* (3 Mac. & G. 440). Bad reasons vitiate good conclusions: *French* v. *Davidson* (3 Madd. 396). Similarly dismissal of members from clubs is upheld if according to rules, not *ex parte*, nor malicious: *Hopkinson* v. *Exeter (Marquis)* (5 Eq. 63); *Fisher* v. *Keane* (11 Ch. D. 353); *Labouchere* v. *Wharncliffe* (13 Ch. D. 346); *Dawkins* v. *Autrabus* (17 Ch. D. 615)†; *Lambert* v. *Addison* (46 L. T. 20). Whoever exercises a similar discretion should observe similar maxims, *e.g.* partners: *Barnes* v. *Youngs* ([1898] 1 Ch. 414). But the Court will not regard the disregard of these maxims by clubs with illegal objects, *e.g.* Trade Unions: *Chamberlain's Wharf* v. *Smith* ([1900] 2 Ch. 605).

Interference by Court.

If the Court disallows the exercise of a discretion as being bad, it will proceed to deal with the property in dispute, questions of detail being referred to Chambers: *In re Roper's Trusts* (11 Ch. D. 273).

Unanimity.

Where trustees exercise a power to postpone conversion of unauthorized securities, they must exercise it unanimously: *In re Roth* (74 L. T. 50). Where there is no duty to sell unless requested they can only sell if requested or if unanimous: *In re Lever* (76 L. T. 71).

Adjectives.

There is apparently no virtue in the adjective "free," "absolute," or "uncontrolled," etc., cases where there is no adjective—*In re Smith, Arnold* v. *Smith, In re Bryant, Wilson* v. *Turner, In re Hodges* (*ubi supra*)—being treated in the same way as those where the adjective is present.

Suspension of Trustees' Powers.

MINORS *v.* BATTISON.

(1 APP. CAS. 428.)

Principle.

Where judgment has been given in an action for the administration of a trust, its general effect is to paralyze the powers of the trustees, and to prevent them from acting in the administration without the sanction of the Court.

Summary of facts.

A testator, who died in 1863, left his newspaper and other property to trustees upon trust after his widow's death, "at the sole discretion of my trustees," to sell the same, and divide the proceeds among his children. In 1866 a suit for administration was commenced, in which a decree was made, followed by an order in 1870, after the death of the widow, declaring that it was for the benefit of all parties that the newspaper should be carried on. The House of Lords, in giving judgment, declared that there was an absolute trust for sale after the death of the widow, and expressed an opinion that the trustees no longer had power to postpone or carry out the sale at their absolute discretion.

First point of the l. c. will not,

The point decided in this case, as stated in *Bubb* v. *Padwick* (13 Ch. D. 517), was that the "mere accidental delay in converting the newspaper property was not to postpone the vesting of the shares, although the gift over was if the children died without having received their shares," but the case is also a leading modern authority for the old and well-established principle stated above.

Second point will, be considered here;

"In my opinion," said Lord Chelmsford, "the true meaning of the clause is that it imposes upon the trustees an absolute trust to sell, but gives them a discretion as to the manner in which, and to a certain extent the time at which, the different properties may be sold to the best advantage." "I cannot help observing," he continued, "that even assuming that the trustees had an absolute discretion, this would not prevent the appellant from being entitled to her share of the testator's residuary estate, because during the life of William Hobson (her father and the testator's son) the trustees had retired from the trust and placed themselves in the hands of the Court by the bill filed by the trustees for administration of the trusts, and the order founded thereon, after which the trustees could not exercise any discretion with which they were invested without the sanction of the Court."

i.e. effect of administration judgment, on powers of trustees,

Lewin thus sums up the effect of the cases (10th ed. p. 710): "The powers assigned in the preceding pages to trustees must be taken subject to the qualification that, if an action has been instituted for the execution of the trust, and a decree made, the powers of the trustees are thenceforth *so far paralyzed* that the authority of the Court must sanction every subsequent proceeding. Thus the trustees cannot commence or defend any action or suit, or interfere in any other legal proceeding, without first consulting the Court as to the propriety of so doing: a trustee for sale cannot sell: the committee of a lunatic cannot make repairs: an executor cannot pay debts, or deal with the assets for the purpose of investments." Subject to this sanction they can exercise their discretion almost the same as heretofore. All cases where their discretion has been sanctioned apply *à fortiori* to cases where there is no administration action; and we have already included some such cases in last chapter, *e.g.* *Brophy* v. *Bellamy*, *Nickisson* v. *Cockill*, *Tempest* v. *Camoys*, *Furley* v. *Hyder*. The following are cases where some restriction was imposed upon trustees by the Court, owing solely to the institution of administration proceedings.

on investments.

In *Bethell* v. *Abraham* (17 Eq. 24) a decree for the administrations of the trusts of Lord Westbury's will had been obtained. The trustees, who had power to invest at their discretion, applied to the Court for liberty to invest in American funds. Infants were interested in the estate, and the Court declined to sanction the proposed investment; and Jessel, M.R., laid down the principle that as long as an estate is subject to administration by the Court, the Court does not allow an investment to be made without being satisfied of its safety.

Appointment of new trustees.

In re Gadd (23 Ch. D. 134) the C. A. decided that a judgment for administration does not take away from the trustee who is donee of the power the power of appointing new trustees, but renders the appointment subject to the supervision of the Court; that if he nominates a fit person, such person must be appointed. If the trustee nominates an improper person the Court calls upon him to make a fresh nomination. If the trustee repeatedly nominates improper persons, that amounts to a refusal to exercise the power, and the Court can then appoint, but the power is not destroyed by a single nomination of which the Court disapproves. The C. A. disapproved of the form of decree in *Middleton* v. *Reay* (7 Ha. 106), which directed the Master to approve of trustees without saving the authority of the donee of the power, and settled the modern form so as to preserve the trustee's power. Compare *Cafe* v. *Bent* (3 Ha. 245).

In *In re Norris* (27 Ch. D. 333), there was an administration action, and the continuing trustee, who was the solicitor to the trustees, appointed his son, who was also his partner, to be a new trustee. The Court held that though the appointment would have been valid if made outside the Court, yet that as there was an administration action, it must withhold its sanction to the appointment in question. Contrast *Stainton* v. *Carron* (18 B. 146).

In *In re Hall* (51 L. T. 901) an administration action had been commenced against a sole trustee who was also tenant for life, but the Court, under the power conferred by Order LV., r. 10, only ordered certain inquiries, among which was one whether any and what steps ought to be taken for the appointment of new trustees. Pending this inquiry the defendant appointed a new trustee. The Court said that the inquiry having been ordered, it was the defendant's duty not to fill up the vacancies without an application for the approval of the Court. The power of nomination was left in him, but the Court had a power of control to see that a fit and proper person is appointed. The proper course would have been to have made an application in Chambers, giving the name of the person nominated, and if it was found that there was no objection to his appointment, it would have been approved, but, as there was no objection made to the person appointed, Pearson, J., did not think it necessary either to refer the matter to Chambers, or expressly to make an order sanctioning the appointment.

(Practice.)

In *Tempest* v. *Lord Camoys* (58 L. T. 221) the testator had nominated as trustees of his will persons to whom he had given beneficial interests, and had empowered the persons beneficially entitled for the time being to appoint new trustees. In an administration action the beneficiaries proposed to appoint one of themselves new trustee, and though objection was made to the appointment on this ground, Chitty, J., appointed him. The Judge said, "Where there is a power of appointment of new trustees, such as I have before me, it is quite clear that the donees of the power cannot exercise it after there is a decree for the execution of the trusts made by the Court without coming to the Court for its sanction. It is, however, equally clear according to the modern practice that where there is a power of this kind to appoint new trustees the right order is not the reference in a common case to appoint new trustees as if the jurisdiction were solely in the Court. The right form of order is that which keeps alive the power. The substance of the order properly is either that the trustees are at liberty to exercise the power subject to the sanction of the Court, or that there are new trustees to be appointed having regard to the power. The substance, therefore, is that the power is not taken away from the trustees. They have it, but the Court also has control over it."

On powers of maintenance.

An administration order does not affect the exercise of powers of maintenance of infants, except that formal sanction must be obtained: the cases mentioned in last chapter apply. Compare *Sillibourne* v. *Newport* (1 K. & J. 602).

On schemes for charities, etc.

In *Lewis* v. *Allenby* (10 Eq. 668) testator bequeathed personalty to trustees upon trust to divide the same among English charities "as they in their sole and uncontrolled discretion shall think fit." The estate was being administered. It was held that the bequest was valid, although part of the personalty was impure, and the trustees were directed to submit a scheme to the V. C. at Chambers. *Lewis* v. *Allenby* was followed by the C. A. in *In re Piercy*, *Whitwham* v. *Piercy* ([1898] 1 Ch. 565): compare *Hagan* v. *Duff* (23 L. R. Ir. 516). This is the usual procedure in schemes for charities during administration actions. See *In re Lea* and *Warren* v. *Clancy*, as cited on p. 51. Similarly with schemes for distributing property among relations, *Supple* v. *Lowson* (Ambl. 728).

Position of trustees pending and after action.

Where there is a pending action for administration, it is imprudent for the trustees to act without first consulting the Court, as the costs and onus will lie on them of proving that what they did was right: *Cafe* v. *Bent* (3 Ha. 245); *A.-G.* v. *Clack* (1 B. 467). In *In re Mansel* (52 L. T. 806) Pearson, J., upheld a sale by the trustees without an order of Court when an order on further consideration reserving only liberty to apply had been made.

Position of executors pending action.

An executor may apply assets in payment of other creditors after a creditor's action for administration has been brought and before judgment: *Neeves* v. *Burrage* (14 Q. B. 504); *In re Radcliffe* (7 Ch. D. 733); approved in *Vibart* v. *Coles* (24 Q. B. D. 364). Where debts are charged on land, such action is a *lis pendens*, which when registered gives plaintiff priority over purchasers from the executor—unless such purchasers have "a right to suppose he is selling or mortgaging for the purpose of paying testator's debts:" *Price* v. *Price* (35 Ch. D. 297), citing *Berry* v. *Gibbons* (8 Ch. 747). See *Lonergan* v. *Holan* ([1896] 1 Ir. R. 401). But such creditor must indicate the land which he wishes to charge (*ib.*).

Note I.—*Objectionable Trustees.*

The following is a list of possible but objectionable trustees. It may be described not as a black list, but as a brown list of various shades, ranging from (9), which is blackest, to (7), which is lightest in hue.

(1) Aliens: since 33 & 34 Vict. c. 14, s. 2.

(2) Bankrupts: *In re Barker's T.* (1 Ch. D. 43); *In re Adams' T.* (12 Ch. D. 634); *In re Hopkins* (19 Ch. D. 61, 63); *In re Lees' S. T.* ([1896] 2 Ch. 508); *Bowen* v. *Phillips* ([1897] 1 Ch. 174); *Bankruptcy Act*, 1883, s. 147. But a bankrupt trustee in bankruptcy vacates his office: *ib.*, s. 85.

(3) *Cestui que trust: Forster* v. *Abraham* (17 Eq. 351); *In re Harrop's T.* (24 Ch. D. 717); *In re Lightbody's T.* (33 W. R. 452). See *In re Courtier, Tempest* v. *Camoys, supra;* (13) *infra.*

(4) Convicts: *Trustee Act*, ss. 25, 48.

(5) Corporations: *A.-G.* v. *Landerfield* (9 Mod. 286); *Wilson* v. *Bury* (5 Q. B. D. 518); *Goodman* v. *Mayor of Saltash* (7 A. C. 633); *In re Tyler* ([1891] 3 Ch. 252); *Assets Co.* v. *Trustees, etc., Corp.* (65 L. J. Ch. 74); *In re Severn & Wye Co.* ([1896] 1 Ch. 559); *Municipal Corporations Act*, 1882, ss. 133, 134.

(6) Crown.

(7) *Feme sole: In re Campbell's T.* (31 B. 176); *In re Berkley* (9 Ch. 720); *In re Peake's S. E.* ([1894] 3 Ch. 520).

(8) Infant.

(9) Lunatic. The Judge in Lunacy can appoint new trustees *vice* a lunatic, and make vesting orders (*Lunacy Act*, 1890, ss. 133–143). If the High Court appoints, it cannot make vesting orders under the *Trustee Act*, 1893, ss. 25–41, unless lunatic is an infant, abroad, or the property is being sold by order of Court: *In re Shortridge* ([1895] 1 Ch. 278); *In re M.* ([1899] 1 Ch. 79). A master in lunacy can only make vesting orders under the *Lunacy Act*, 1891, when appointing a person to exercise lunatic's power of appointing new trustees: *In re Fuller* ([1900] 2 Ch. 551); *In re Langdale* ([1901] 1 Ch. 3). As to vesting orders by the Judge in Lunacy, see *In re C. M. G.* ([1898] 2 Ch. 324).

(10) Married women: *In re Docwra* (29 Ch. D. 693), *Trustee Act*, 1893, s. 16; *M. W. P. Act*, 1883, s. 18. See *ante*, p 119.

(11) Relations to one another: *In re Norris, supra; In re Knowles' S. E.* (27 Ch. D. 707).

(12) Residents abroad: *In re Freeman's S. T.* (37 Ch. D. 148) (a remunerated trustee); *In re Simpson* ([1897] 1 Ch. 256).

(13) Solicitor to tenant for life: *In re Kemp's S. E.* (24 Ch. D. 485); *In re Marquis of Ailesbury* ([1893] 2 Ch. 345, 360); *In re Earl Stamford* ([1896] 1 Ch. 288, 298) (S. L. A. trustees).

(14) Solicitor-trustee's partner: *In re Norris, supra.*

The following may be described as a black list:—

The Bank of England; and as to most trusts the National Debt Commissioners and Savings Banks (see *Government Annuities Act*, 1882, s. 8), and self. A trustee cannot be appointed by himself: *In re Newen* ([1894] 2 Ch. 297, 309), following *In re Skeat's S.* (42 Ch. D. 522). See Lewin, pp. 28 *et seq.*

Note II.—*Appointment of Trustees.*

Reference has been made to Vesting Orders, and declaration, and appointments of new trustees. Appointments and Vesting Orders are made by the High Court under sects. 25–41 of the *Trustee Act*, 1893. See *Practice Note* ([1901] W. N. 85), and *supra*, "lunatic."

The *Judicial Trustees Act*, 1896, enables the Court to appoint a nominee of the Petitioner, or an official of Court judicial trustee with remuneration. See Rules, 1897, and *Douglas* v. *Bolam* ([1900] 2 Ch. 749); *In re Ratcliff* ([1898] 2 Ch. 352).

Appointment of new trustees under *Trustee Act*, 1893.

The *Trustee Act*, 1893, ss. 10–12, provides for the appointment of new trustees by individuals *vice* trustees who are dead, abroad, *In re Stamford* ([1896] 1 Ch. 288); *In re Walker* ([1901] 1 Ch. 259), unfit, incapable, or desirous to be discharged; and enable "a vesting declaration" to be made, by means of which the trust property vests in the new trustees without conveyance. The declaration is to be made—

(1) By the appointor, in case of an appointment of a new trustee;

(2) By the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees in case of the discharge of a retiring trustee under the Act.

But a vesting declaration does not apply and a vesting order must be obtained for "any legal estate or interest in copyhold or customary land," or to mortgaged land, unless the mortgager declares himself trustee, *London and County B. Co.* v. *Goddard* ([1897] 1 Ch. 642), or to stocks and shares, etc., "transferable in books kept by a company or other body, or in manner directed by or under Act of Parliament."

Sect. 10 (2) (*b*) enables separate trustees to be appointed "for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees; or if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part."

In *In re Hetherington's T.* (34 Ch. D. 211) and *In re Moss' T.* (37 Ch. D. 513), separate sets of trustees were appointed for different parts of the property, the trusts whereof, though separate for the time, might eventually coalesce. See Wolstenholm C. Act, etc., 8th ed., pp. 214 *et seq.*

Power of Trustees to Appoint Investment Agents, etc.

SPEIGHT *v.* GAUNT.

Principle.

(22 Ch. D. 727; 9 App. Cas. 1.)

A trustee cannot delegate his trust, but he may in the administration of the trust funds employ agents, bankers, brokers and others, in cases of moral necessity, or in the usual course of business, and in the absence of negligence or default he will not be held liable for loss.

Summary of facts.

A trustee employed a broker whose honesty and solvency he had no reason to suspect to buy securities of certain municipal corporations authorized by his trust. The broker gave the trustee a bought note which purported to be subject to the rules of the London Stock Exchange, and obtained from him over £15,000 on a statement that the money would have to be paid next day, which was, in fact, the next settling-day. Although some of the securities were not bought and sold on the Stock Exchange, and the form of the bought note would have excited the suspicions of an expert, there was nothing to excite the suspicions of an ordinary prudent man of business. The broker never obtained the securities, and shortly afterwards became insolvent, and the trust money was lost. In an action to compel the trustee to make good the loss with interest at four per cent. the House of Lords decided (affirming the C. A.) that he was not liable.

Delegatus non potest delegare.

The maxim *delegatus non potest delegare* only applies to trustees, subject to important exceptions. These exceptions have grown more numerous as the use of agents has been introduced more and more into business transactions, and the equitable principle which now prevails is summed up in *Speight* v. *Gaunt* and the *Trustee Act*, 1893, s. 24, which section does not substantially alter the principles of the l.c.: *In re Brier* (26 Ch. D. 238). Jessel, M.R., in an oft-quoted passage (22 Ch. D. 727, 746), expressed the equitable principle thus:—

Modern tendency favours trustees.

"My view has always been this, that where you have an honest trustee, fairly anxious to perform his duty, and to do as he thinks best for the estate, you are not to strain the law against him to make him liable for doing that which he has done, and which he believes is right, in the execution of his duty, without you have a plain case made against him. In other words, you are not to exercise your ingenuity, which it appears to me that the Vice-Chancellor has done, for the purpose of finding reasons for fixing a trustee with liability, but you are rather to avoid all such hypercriticism of documents and acts, and to give the trustee the benefit of any doubt or ambiguity which may appear in any document, so as to relieve him from the liability with which it is sought to fix him. I think it is the duty of the Court in these cases, where there is a question of nicety as to construction or otherwise, to lean to the side of the honest trustee, and not to be anxious to find fine and extraordinary reasons for fixing him with any liability upon the contract. You are to endeavour as far as possible, having regard to the whole transaction, to avoid making an honest man, who is not paid for the performance of an unthankful office, liable for the failure of other people from whom he receives no benefit;" and he added, "I think that this is the view which has been taken by modern judges, and some of the older cases in which a different view has been taken would now be repudiated with indignation."

Principle of *Ex parte Belchier* authorises agents where usual;

The House of Lords approved the rule laid down by Hardwicke, L.C., 150 years ago, in *Ex p. Belchier* (Amb. 218), which was according to Lord Blackburn (9 A. C. 19), that "where there is a usual course of business, the trustee is justified in following it, though it may be such that there is some risk that the property may be lost by the dishonesty or insolvency of an agent employed;" and he added, "What was at one time the usual course may at another time be no longer usual," illustrating his point by the practice of crossing cheques, which had arisen within living memory. On the other hand, the rule to which *Speight* v. *Gaunt* is an exception still holds; and nothing in this case or in any statute "authorizes," in Lord Selborne's words (p. 5), "a trustee to delegate at his own mere will and pleasure the execution of his trust, and the care and custody of trust moneys to strangers in any case in which (to use Lord Hardwicke's words) there is no 'moral necessity from the usage of mankind' for the employment of such an agency."

and applies to paid trustees.

The principles of *Speight* v. *Gaunt* and of the *Trustee Act*, 1893, apply equally whether the trustee is or is not remunerated for his services: *Wilkinson* v. *W.* 2 S. & S. 237; *Jobson* v. *Palmer* ([1893]

1 Ch. 71). They may be summed up in the following rules and illustrations of rules; but it must be borne in mind that the illustrations are not exhaustive, but only typical; and that even in equity rules are only rules, and every case is governed by its own facts.

I. Enlargement of trustees' powers.

Custody of trust funds by broker.

(1) Although trustees ought not to instruct a stockbroker or other agent to seek an investment and then deposit their money with the agent until the investment is found: yet when the investment is found they may deposit the money with the agent if and so long as that is customary and reasonable. Under the peculiar circumstances of the l.c. the money was deposited with the stockbroker for over four weeks: *In re Gasquoine* ([1894] 1 Ch. 470).

Advice by broker and solicitor.

(2) Although trustees ought not to pay the purchase-money to the broker in the case of stock issued to the purchaser direct, unless perhaps by cheque specially crossed (9 A. C. 11, 27, 28), yet if they do not know that the stock is of this description, they are entitled to rely on their broker's representation that the money is payable through him. Similarly they are entitled to rely on their solicitor's advice that the title is good: *Rochfort* v. *Seaton* ([1896] 1 Ir. R. 18); contrast sub-rule (24). The l.c. applies not only to acts done, but to information and advice given by the agent.

Receipt of securities by banker or solicitor.

(3) Bonds with coupons may be left with bankers on receipt being given. The bankers may collect the coupons: *De Pothonier* ([1900] 2 Ch. 529). Mortgage deeds to which reference has to be made may be left with the solicitor: *Field* v. *F.* ([1894] 1 Ch. 425). Money may be left at a bank while trustees, *Adams* v. *Claxton* (6 Ves. 226), or investments are being changed, *Clough* v. *Bond* (3 M. & C. 490)*; but not more than six months or so: per Kay, J., *Cann* v. *C.* (51 L. T. 770). Yet fourteen months, *Fenwick* v. *Clarke* (4 D. F. & J. 240), nine months, *Johnson* v. *Newton* (11 Ha. 160), one year, *Swinfen* v. *S.* (29 B. 211), many months, *Wilks* v. *Groom* (3 Dr. 584), three and a half years, *In re Marcon* (40 L. J. Ch. 537), have been allowed in executorship cases. The pitfalls suggested in Note, p. 193, must be avoided. On delay see *T. Act*, 1893, s. 17 (3).

Securities must be seen by trustee.

(4) But the securities must be handed over by the broker, *Matthews* v. *Brise* (6 B. 239); *Bullock* v. *B.* (56 L. J. Ch. 221), or produced by the solicitor to the trust and seen by the trustee: *Rowland* v. *Witherden* (3 Macn. & G. 568). He must use his eyes: *Lewis* v. *Nobbs* (8 Ch. D. 591).

Receipt of money by banker and solicitor.

(5) The *Trustee Act*, 1893, s. 17 (2) allows trustees to appoint a banker or solicitor their agent to receive trust policy moneys, and to entrust them with the policy containing a signed receipt for that purpose.

(6) Sect. 17 (1) allows trustees to appoint a solicitor their agent to receive trust moneys or property and to entrust them with receipted deeds in order that they may produce them under the provisions of the *C. Act*, 1881, s. 56.

As to (5) and (6). "In the absence of anything to suggest the contrary the person paying the money is bound to assume that the solicitor producing the deed is acting as solicitor for the person having power to give a discharge:" per Farwell, J., in *King* v. *Smith* ([1900] 2 Ch. 425), citing and approving Hood and Challis C. A. ed. 5, p. 138. But see *Day* v. *Woolwich, etc., Soc.* (40 Ch. D. 491). In *In re Hetling & Merton's Contract* ([1893] 3 Ch. 269) purchaser knew that the solicitor was improperly made agent, *i.e.* by general power of attorney, and successfully objected to complete.

Employment of agents within the scope of their profession, *e.g.* solicitors

(7) Agents must not be employed out of the ordinary scope of their business. "It does not follow that he can intrust his agents with any duties which they are willing to undertake, or pay them, or agree to pay them, any remuneration which they see fit to demand:" per Kekewich, J., in *In re Weall* (42 Ch. D. 674).

Thus, subject to 4 and 5, a solicitor is not an investment agent, and "every trustee knows that if he allows trust moneys to go into the hands of the solicitor, unless there is some extraordinary reason for doing so, he is just as much liable as if he puts the money in his own pocket:" per Kay, J., in *In re Dewar* (54 L. J. Ch. 830); *Thompson* v. *Finch* (22 B. 316, 8 D. M. & G. 560); *Rowland* v. *Witherden* (3 Mac. & G. 568, 574); *Bostock* v. *Floyer* (1 Eq. 26) (cited in l.c. 22 Ch. D. 761).

Nor is he a rent-collector; thus part of the remuneration allowed him in this capacity was disallowed to his employers in *In re Weall* (42 Ch. D. 674); while a proper rent-collector's charges were allowed without question in *In re Brier* (26 Ch. D. 238): *Wilkinson* v. *W.* (2 S. & S. 237).

and valuers.

Nor is a solicitor agent to appoint agents, *e.g.* valuers. A trustee must choose and appoint his own agents for the particular purpose in hand: *In re Walker* (59 L. J. Ch. 386). Note: "solicitor to the trust" is a misnomer for "solicitor to the trustee:" *Staniar* v. *Evans* (34 Ch. D. 476–77); *Ex p. Lloyd George* ([1898] 1 Q. B. 526–27). A solicitor, if asked to name a valuer, should submit a name or names to the trustees and tell them everything which he knows to guide their choice, but should leave the choice to the trustees: *Fry* v. *Tapson* (28 Ch. D. 268). (The decision in this case that a local valuer ought to have been employed is superseded by the *Trustee Act*, 1893, s. 8, re-enacting 51 & 52 Vict. c. 59, s. 4.) A valuer who tells the trustee not what the property is worth, but what loan it can carry, *In re Stuart* ([1897] 2 Ch. 583); *In re Olive* (34 Ch. D. 70), is not submitting a valuation, but is usurping the functions of a trustee. Information that the property is let for so much, without adding for how long, by how many leases, etc., is inadequate: *ib.*, and *In re Partington* (57 L. T. 654). It is the valuer's business to furnish *data* for opinions: *Learoyd* v. *Whiteley* (12 A. C. 727, 734). If the trustees must carry on a business, valuers and auditors may be employed: *In re Bennett* ([1896] 1 Ch. 778).

and brokers.

An "outside broker" is not a stockbroker: *Robinson* v. *Harkin* ([1896] 2 Ch. 415).

(8) In the investment of trust funds it is unwise to employ the

One agent for lender and borrower.

borrower's solicitor, *Waring* v. *W.* (3 Ir. Ch. R. 331); *Sutton* v. *Wilders* (12 Eq. 373); *In re Stuart* ([1897] 2 Ch. 583); compare *Day* v. *Woolwich, etc., Soc.* (40 Ch. D. 491), or valuer, *Smethurst* v. *Hastings* (30 Ch. D. 490); *Rae* v. *Meek* (14 A. C. 558); compare *Sheffield, etc., Society* v. *Aizlewood* (44 Ch. D. 412, 457).

Two-thirds and one-half rule in equity and under statute.

(9) The *Trustee Act*, s. 8 (1) makes the report of an *independent* valuer showing that the *property* exceeds the loan by one third *and advising the loan* an absolute protection to a trustee-mortgagor in cases of authorized but inadequate securities. This rule differs from the equitable rule (from which it is borrowed) in the italicised words. The equitable "two-thirds rule" still holds in cases where the trustee does not adopt the statutory safeguard, and is stated thus by Lewin, 10th ed. pp. 363, 364: "Trustees could not be advised to advance more than two-thirds of the actual value of the estate if it were freehold land, and if the property consist of freehold houses they should not lend so much as two-thirds, but say one-half the actual value." The rule, however, of two-thirds, or one-half, is "only a general one, and where trustees have lent on the security of property of less value, but acted honestly, they have been protected by the Court and allowed their cost. . . . As to buildings used in trade, and the value of which must depend on external and uncertain circumstances, trustees would not in general be justified in lending so much as one-half:" see *Budge* v. *Gummow* (7 Ch. 719). The one-half rule can be traced also in *Stickney* v. *Lewell* (1 M. & C. 8); *In re Olive* and *In re Partington, supra.* But this two-thirds or one-half rule is elastic. Thus in *In re Godfrey* (23 Ch. D. 483), Bacon, V.C., said that the rule had never been applied with mathematical strictness, and declined to apply it to a case where a farm had become unlettable and unsaleable owing to unfavourable weather, and had not been valued for the purposes of the mortgage. See rule (11). Rule (9) does not apply to investments forbidden under rule (10).

Paramount rule against

(10) A trustee must take "in managing trust affairs all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own" (9 A. C. 19). Therefore, although investments are within the scope of the trust they will be disallowed if highly speculative; thus—

speculative securities.

In *Smethurst* v. *Hastings* (30 Ch. D. 490), trustees who had invested money on the security of sub-mortgages of leasehold houses which were unfinished and unlet, were liable to make good the loss. These houses, said Bacon, V.C., "were of merely speculative value." Compare *In re Walker* (59 L. J. Ch. 386); *In re Salmon* (42 Ch. D. 351, 370); *Rae* v. *Meek* (14 A. C. 558); *Blyth* v. *Fladgate* ([1891] 1 Ch. 337, 354). *Ecclesiastical Commissioners* v. *Pinney* ([1900] 2 Ch. 736) was a similar gamble, but a purchase. In *Stewart* v. *Sanderson* (10 Eq. 26) a wasteful investment was disallowed.

In *Whiteley* v. *Learoyd* (12 A. C. 727), trustees, though advised by a competent solicitor and a competent surveyor, were held liable for loss occasioned by an investment on freehold brickfield and works, *i.e.* on a speculative trading adventure. Compare *In re Turner* ([1897] 1 Ch. 536, 543) (china-clay works).

In *Knox* v. *Mackinnon* (13 A. C. 753), the trustees, who were authorized to invest, and invested on personal security, were held liable on the ground that they had not acted with perfect impartiality as between the beneficiaries, and had not brought to the management of the trust affairs the same care and diligence that a man of ordinary prudence would have exercised in his own affairs, although their trust deed, like the trust deed in *Rae* v. *Meek*, contained a clause of immunity for "omissions, errors, or neglect of management." See *ante*, pp. 162, 163.

Retention of securities.

(11) Rule (9) does not apply to the retention but only to the creation of inadequate investments. A new trustee need not value nor call in a mortgage because land is falling in value, *In re Chapman* ([1896] 2 Ch. 763)*, approving *In re Medland* (41 Ch. D. 476); nor sell at once, nor go to law because an investment is bad; *Buxton* v. *B.* (1 My. & Cr. 80); *Marsden* v. *Kent* (5 Ch. D. 598); *Thompson* v. *Finch* (22 B. 326), citing *Walker* v. *Symonds* (3 Sw. 1). Since *In re Chapman*, *The Trustees Act*, 1893, *Amendment Act*, 1894, s. 4, protects trustees for retaining securities which have become unauthorized. (*a*) But it is his duty to "see what the estate consists of," *In re Norwich Ass. Soc.* (57 L. T. 241), and then do his best; and if so, he will not be punished for ill-success. (*b*) And he must call in all debts due to settlor by going to law, *In re Brogden* (38 Ch. D. 546); *In re Gasquoine* ([1894] 1 Ch. 470), except debts already accrued under a covenant for settling future property, of which debts he has no notice, *Ex p. Geaves* (8 D. M. & G. 291, 309). Comp. *Youde* v. *Cloud* (18 Eq. 634). See pp. 139, 163.

A retiring trustee can only be liable for his successor's mistake if he retired in order that the mistake might be committed: *Head* v. *Gould* ([1898] 2 Ch. 250)†.

Trustee and co-trustee.

(12) All these rules apply as between trustee and co-trustee. If a trustee allows his colleague to receive trust moneys and gives a receipt he must show (*a*) that he signed the receipt merely because a trustee's receipts must be signed by all the trustees, not because he received the money; (*b*) that "there was a moral necessity from the usage of mankind" that this should be done; (*c*) that in case of rents, he received accounts and vouchers from his colleague, *Baylis* v. *Dick* ([1878] W. N. 81); and in case of capital moneys he resumed joint control at the earliest opportunity: *Brice* v. *Stokes* (W. & T. L. C. 2, 633)*; *In re Fryer* (3 K. & J. 317); *Thompson* v. *Finch* (22 B. 316); *Lewis* v. *Nobbs* (8 Ch. D. 591); *In re Gasquoine* ([1894] 1 Ch. 470).

Rules (5) and (6) make the receipt of capital moneys by one of several trustees unusual now.

Excuses no defence.

(13) The trustee should not rely on his ears, for in case he neglects any of the above rules plausible excuses offered by his co-trustee or agent will not avail him: *Gough* v. *Etty* (20 L. T.

358) (banker); *Wyman* v. *Paterson* ([1900] A. C. 271); *Hanbury* v. *Kirkland* (3 Si. 265); *Mendes* v. *Guedalla* (2 J. & H. 259); *Rowland* v. *Witherden* (3 Mac. & G. 568) (solicitor); *Thompson* v. *Finch* (22 B. 316) (solicitor co-trustee); *Trutch* v. *Lamprell* (20 B. 116) ("acting" co-trustee).

As a corollary from rules (12) and (13) trustees should avoid making any investment which subjects the trust funds to the control of any one of the trustees singly: *Clough* v. *Bond* (3 M. & C. 490); *Consterdine* v. *C.* (31 B. 330); *Lincoln* v. *Wright* (4 B. 427); *Dix* v. *Burford* (19 B. 409); *Trutch* v. *Lamprell*; *Lewis* v. *Nobbs* (*supra*); *In re Evans* (26 Ch. D. 58); *Field* v. *F.* ([1894] 1 Ch. 425); *In re Taylor* (81 L. T. 812).

As to making the active reimburse the passive trustee in case of loss, see pp. 192, 193.

II. Other rules as to investment.

Passing from the subject of Agency and Investment to Investment, the following sub-rules or maxims may be found useful:—

Consents;

(14) Consents or other conditions annexed to the power to invest or vary investments should be observed strictly: *Bateman* v. *Davis* (3 Mad. 98); *Child* v. *C.* (20 B. 50); *In re Massingberd's S.* (63 L. T. 296); but see *Stevens* v. *Robertson* (37 L. J. Ch. N. S. 499).

power to vary;

(15) As a rule a power to invest implies a power to vary investments: *In re Clergy Orphan C.* (18 Eq. 280); *Hume* v. *Lopes* ([1892] A. C. 112).

to sub-mortgage;

(16) A power to invest on mortgage authorizes sub-mortgages, (*Smethurst* v. *Hastings* (30 Ch. D. 490); but not contributory mortgages: *Webb* v. *Jonas* (39 Ch. D. 660); *In re Massingberd's S.* (63 L. T. 296); *Stokes* v. *Prance* ([1898] 1 Ch. 212, 224), nor stock mortgages, *Whitney* v. *Smith* (4 Ch. 513).

municipality;

(17) On municipal corporate bodies, does not authorize harbour bonds: *Hutton* v. *Annan* ([1898] A. C. 289); *Wood* v. *Middleton* (79 L. T. 155).

company;

(18) On companies incorporated by Act of Parliament, does not authorize joint stock companies: *In re Smith* ([1896] 2 Ch. 590), distinguishing *Elve* v. *Boyton* ([1891] 1 Ch. 501).

ground rent;

(19) In buying land, includes ground rents: *In re Peyton's S. T.* (7 Eq. 463).

loans to firms;

(20) On loans to a firm, does not authorize a loan when the members of the firm have changed: *In re Tucker* ([1894] 1 Ch. 724, 733; 3 Ch. 429); *Smith* v. *Patrick* ([1901] A. C. 282).

title;

(21) A trustee, if mortgagor or purchaser, need not insist on a forty years' title; and if mortgagor, can dispense with lessor's title. *T. Act*, s. 8 (2), (3).

tenant for life.

(22) Trustees when entertaining the question of investment should not favour the tenant for life at the expense of the remaindermen: *Tickner* v. *Old* (18 Eq. 422); *Knox* v. *Mackinnon* (*supra*); either because such investments are of the kind prescribed by rule (10), *Stewart* v. *Sanderson* (10 Eq. 26), or because, as Kay, L.J., said in *In re Dick* ([1891] 1 Ch. 423; [1892] A. C. 112), "Trustees must

bear in mind that the duty of a trustee when he is called upon to change an existing investment is an important duty, and that it would not be a proper exercise of his discretion to change the investment merely for the sake of increasing the income of the tenant for life if in doing so he diminishes the security of the capital fund." Compare *In re Owthwaite* ([1891] 3 Ch. 494); *In re Atkins* (81 L. T. 421). In case capital is lost, an innocent tenant for life need not account to remainderman for excessive income received: *In re Alston* ([1901] 2 Ch. 584); but see *In re Bird* ([1901] 1 Ch. 916). See *ante*, p. 157 (2).

(23) Nevertheless a loan to tenant for life has been upheld where the power was to invest with tenant for life's consent on personal security: *In re Laing's S.* ([1899] 1 Ch. 593).

Advice of counsel or court.

(24) Solicitor's or counsel's advice as to law will not relieve against mistakes of law: *Stott* v. *Milne* (*post*, p. 207).

(25) Trustees and executors are enabled by R. S. C., 1883, O. LV., r. 3 (*g*), to apply to a judge of the Chancery Division by originating summons for the determination of any question arising in the administration of the estate or trust.

(26) The Court cannot sanction an investment forbidden by the trust: *In re Morrison* ([1901] 1 Ch. 701); *Ovey* v. *O.* ([1900] 2 Ch. 524); but may sanction investments outside it: *In re New* ([1901] 2 Ch. 534).

NOTE I.—*Investments by Trustees.*

List of authorized investments.

Investments authorized by the *Trustee Act*, 1893, are as follows:—

A trustee or building society may, unless forbidden by and subject to consent required by the instrument creating the trust, invest trust funds:—

Sect. I. (*a*) "In any of the parliamentary stocks or public funds or government securities of the United Kingdom:

(*b*) On real or heritable securities in Great Britain or Ireland:

(*c*) In the stock of the Bank of England or the Bank of Ireland:

(*d*) In India three and a half per cent. stock and India three per cent. stock, and similar future issues:

(*e*) In any securities the interest of which is for the time being guaranteed by Parliament:

(*f*) In consolidated stock created by the Metropolitan Board of Works, or by the London County Council, or in debenture stock created by the receiver for the Metropolitan Police District:

(*g*) In the debenture or rent-charge or guaranteed or preference stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having during each of the ten years last past before the date of investment paid a dividend at the rate of not less than three p.c. per an. on its ordinary stock:

(*h*) In the stock of any railway or canal company of Great Britain or Ireland whose undertaking is leased in perpetuity or for a term of not less than two hundred years at a fixed rental to any such railway company as is mentioned in sub-sect. (*g*) either alone or jointly with any other railway company:

(*i*) In the debenture stock of any railway company in India the interest on which is paid or guaranteed by the Secretary of State in Council of India:

(*j*) In the 'B' Annuities of the Eastern Bengal, the East Indian and the Scinde, Punjaub and Delhi Railways and any like annuities which may at any time hereafter be created on the purchase of any other railway by the Secretary of State in Council of India, and charged on the revenues of India, and which may be authorized by Act of Parliament to be accepted by trustees in lieu of any stock held by them in the purchased railway; also in deferred annuities comprised in the register of holders of annuity Class D, and annuities comprised in the register of annuitants Class C of the East India Railway Co.:

(*k*) In the stock of any railway company in India upon which a fixed or minimum dividend in sterling is paid or guaranteed by the Secretary of State in Council of India, or upon the capital of which the interest is so guaranteed:

(*l*) In the debenture or guaranteed or preference stock of any company in Great Britain or Ireland, established for the supply of water for profit, and incorporated by special Act of Parliament or by royal charter, and having during each of the ten years last past before the date of the investment paid a dividend of not less than five pounds per cent. on its ordinary stock:

(*m*) In nominal or inscribed stock issued, or to be issued, by the corporation of any municipal borough, having according to the returns of the last census prior to the date of investment a population exceeding fifty thousand, or by any county council, under the authority of any Act of Parliament or Provisional Order:

(*n*) In nominal or inscribed stock issued, or to be issued, by any Commissioners incorporated by Act of Parliament for the purpose of supplying water, and having a compulsory power of levying rates over an area having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, providing that during each of the ten years last past before the date of investment the rates levied by such Commissioners shall not have exceeded eighty per cent. of the amount authorized by law to be levied:"

(*o*) Investments authorized for the investment of cash under the control of the Court. See R. S. C. [1897], O. XXII., r. 17.

(*p*) The *Colonial Stock Act*, 1900, adds Colonial Stock registered in the United Kingdom.

The *National Debt* (*Conversion*) *Act*, 1888 (s. 27), enacts that a trustee getting new stock thereunder may sell the same, and invest the proceeds in the investments mentioned in (*o*), "*notwithstanding anything to the contrary contained in the instrument creating the trust.*"

Purchase at a premium.

The Act of 1893, s. 2, provides that (1) "a trustee may under the powers of this Act invest in any of the securities mentioned or referred to in sect. 1 of this Act; notwithstanding that the same may be redeemable, and that the price exceeds the redemption value."

(2) But that a trustee may not purchase at a price exceeding value any stock mentioned in (*g*), (*i*), (*k*), (*l*), (*m*), and (*p*) if it is "liable to be *redeemed within fifteen years of the date of purchase* at par, or at some other fixed rate," nor may he purchase any such stock if it "is liable to be redeemed at par or at some other fixed rate at a *price exceeding fifteen per cent.* above par or such other fixed rate."

(3) "A trustee may retain until redemption any redeemable stock, fund, or security." Compare the Act of 1894, s. 4, cited *ante*, p. 175 (11).

Provisions are also contained in sects. 5 and 19, which enlarge a trustee's power of investing on mortgages for long terms, and of renewing leaseholds, etc.

Note II.—*Indemnity to Trustees*, 1893 *Act*.

The Indemnity to Trustees under the Trustee Act, 1893, is as follows:—

Liability for loss by reason of improper investments.

"Sect. 9.—(1) Where a trustee improperly advances trust money on a mortgage security which would at the time of the investment be a proper investment in all respects for a smaller sum than is actually advanced thereon, the security shall be deemed an authorized investment for the smaller sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest."

The trustee can insist on an unauthorized security being transferred to himself, *In re Salmon* (42 Ch. D. 351), unless the *c.q.t.* is an infant: *Head* v. *Gould* ([1898] 2 Ch. 250).

This section only applies to authorized investments of inadequate value: *In re Turner* ([1897] 1 Ch. 536, 541).

See, too, *In re Somerset* ([1894] 1 Ch. 231).

"(2) This section applies to investments made as well before as after the commencement of this Act, except where an action or other proceeding was pending with reference thereto on the 24th day of December, 1888."

Indemnity for breach of trust.

"Sect. 45.—(1) Where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the High Court may, if it thinks fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use, and restrained from anticipation, make such order as to the Court seems just for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him": *Rickets* v. *R.* (64 L. T. 263); *Griffith* v. *Hughes* ([1892] 3 Ch. 105); *In re Somerset* (*supra*); *Bolton* v. *Curre* ([1895] 1 Ch. 544). A similar right exists independently of statute, see *Chillingworth* v. *Chambers* ([1896] 1 Ch. 685)†, where the *c.q.t.* was co-trustee. For procedure see *In re Holt* ([1897] 2 Ch. 525), approved in *Molyneux* v. *Fletcher* ([1898] 1 Q. B. 648).

(2) Makes this provision retrospective.

Procedure. For procedure under the Act, see R. S. C. 1883, O. LIV. B.

[See Godefroi on Trust, Ch. XV.]

NOTE III.—*Relief to Trustees,* 1896 *Act.*

The Judicial Trustee Act, 1896, s. 3, enacts that if it appears to the Court that a trustee is or may be personally liable for any breach of trust, "but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter," then the Court may relieve him from liability, wholly or partly.

With the exception of one case of *devastavit* by an executor, *In re Kay* ([1897] 2 Ch. 518), every case hitherto brought on this section has been brought for relief against breach of one or other of the above rules. Relief has been granted for breach of rr. (7) and (13), *In re De Clifford's E.* ([1900] 2 Ch. 707); r. (11), *In re Grindey* ([1898] 2 Ch. 593; r. (24), *Perrins* v. *Bellamy* ([1899] 1 Ch. 797); *In re Roberts* (76 L. T. 479).

Relief has been refused in breaches of rr. (7), (8), and (9), *In re Stuart* ([1897) 2 Ch. 583); rr. (10) and (13), *In re Turner* ([1897] 1 Ch. 536); rr. (12) and (13), *In re Second East Dulwich B. Soc.* (79 L. T. 726); r. (12), *Wynne* v. *Tempest* ([1897] W. N. 43); as to breach of r. (17), *query*, *Wood* v. *Middleton* (79 L. T. 155).

If either party fails in an application under this section, costs will probably be given against them: *In re Second East Dulwich B. Soc.*, *Perrins* v. *Bellamy* (*supra*).

Fraud on a Power.

HENTY *v.* WREY.

(21 Ch. D. 332.)

Principl

There is no rule of law that every power for raising portions for children is subject to the qualification that the portions are not raisable under it unless the children live to want them.

The Court will not infer that an appointment is a fraud upon a power unless there are such cogent facts that it cannot reasonably come to any other conclusion.

Summary of facts.

Sir B. P. Wrey had a power to charge portions for younger children on real estate, and to fix the ages and times at which the portions should vest and be payable. In 1828 and 1832 he appointed £10,000 to his three daughters, aged nine, seven, and one, equally, the portions to vest at once and to be paid after his death. There were provisions for maintenance and advancement. Two of the daughters having died infants and spinsters, Sir B. P. Wrey in 1851 appointed that £5000 should be paid to his surviving daughter after his death. Then she and her husband reassigned to him their share in the remaining £5000, which appointor then mortgaged to Henty. Held, by the C. A., that Henty was entitled to have the £5000 raised.

Principle. *Aleyn* v. *Belchier.*

Aleyn v. *Belchier* (1 Eden. 132 (1758))* proceeded upon the principle that "no point is better established than that a person having a power of appointment must execute it *bonâ fide* for the end designed, otherwise it is corrupt and void." The main question in the l.c. was whether there was a general rule which compelled the Court to set aside an appointment of a charge on realty not on the ground of actual fraud, but on the ground that the power is "a discretionary trust" (*ante*, p. 159 (1)), that it is contrary to the nature of the trust to make an appointment so as to vest portions in children of tender years. The C. A. pointed out that plainer or more emphatic words, authorizing a direction that the portions should vest at any time which the appointor should think fit, could not be imagined. The rule contended for was opposed to principle, "the principle being that such contracts or settlements are to have effect given to them according to the intention," and opposed also to the modern rules of construction.

Of *Lord Hinchinbroke* v. *Seymour.*

Jessel, M.R., then traced this alleged rule to *dicta* in *Lord Hinchinbroke* v. *Seymour* (1 Bro. C. C. 395), which had not been followed, and he adopted the view of this case which was expressed by Lord Eldon in *M'Queen* v. *Farquhar* (11 V. 467): "In Lord Sandwich's case" (Lord Hinchinbroke became Lord Sandwich), "a father having a power of appointment, and thinking one of his children was in a consumption, appointed in favour of that child. And the Court was of opinion that the purpose was to take the chance of getting the money as administrator of that child" (p. 479). The facts of this case were totally different. Indeed, here there were cogent reasons for making the portions vest at once, for otherwise the children would be left without provision, and there would be no fund available for their maintenance and advancement. "When you see," said Jessel, M.R., "that there was a reason for appointing portions, and making them vest immediately, with a view to the benefit of the children, you are not to impute to the father an intention to commit a fraud upon the power."

Fraud not to be presumed.

Summary of the law by Lindley, L.J.

The law established by twenty old cases was summed up by Lindley, L.J., in the following propositions:—

"1. That powers to appoint portions charged on land ought, if their language is doubtful, to be construed so as not to authorize appointments vesting those portions in the appointees before they want them, that is, before they attain twenty-one or (if daughters) marry.

"2. That where the language of the power is clear and unambiguous —effect must be given to it.

"3. That where upon the true construction of the power and the appointment, the portion has not vested in the lifetime of the appointee the portion is not raisable, but sinks into the inheritance.

"4. That where upon the true construction of both instruments the portion has vested in the appointee, the portion is raisable even although the appointee dies under twenty-one or (if a daughter) unmarried.

"5. That appointments vesting portions charged on land in children of tender years who die soon afterwards are looked at with suspicion; and very little additional evidence of improper motive or object will induce the Court to set aside the appointment or treat it as invalid, but that without some additional evidence the Court cannot do so."

Classified illustrations.

In the following examples it is assumed that A. has given a special power of appointment among children to B., and B. appoints either (1) to children and others, or (2) to children with a charge, (3) direction, or (4) condition in favour of others, or (5) under an agreement to resettle on themselves and others. The first four dispositions, if severable, stand in so far as they affect children, unless the appointment is not fairly and honestly made; for, as was said in *Duke of Portland* v. *Topham* (11 H. L. C. 32), "A party having a power like this (*i.e.* a limited power) must fairly and honestly execute it without having any ulterior object to be accomplished. He cannot carry into execution any indirect object or acquire any benefit for himself either directly or indirectly." The fifth fails wholly if the appointment is induced "by the agreement" (see *In re Turner's S. E.* (28 Ch. D. 205)), or if "the appointment would not have been made but for the bargain:" *Pryor* v. *P.* (2 D. J. & S. 205). In the following examples the dispositions take effect as though the words in square brackets had never been written and "election" cannot take place, except in the cases mentioned, *post*, p. 304 (5):—

Appointments: I. to children and others;

I.—(1) B. appoints to trustees for a child, *Thornton* v. *Bright* (2 My. & Cr. 230), but the Court will not as of course hand the fund over to the derivative trustees: *Busk* v. *Aldam* (19 Eq. 16); *Von Brockdorff* v. *Malcolm* (30 Ch. D. 182); *Scotney* v. *Lomer* (31 Ch. D. 386); *In re Tyssen* ([1894] 1 Ch. 56).

(2) B. appoints to trustees to sell and pay proceeds to the child: *In re Paget* ([1898] 1 Ch. 290).

(3) B. appoints part to children [part to strangers]: *Alexander* v. *A.* (2 Ves. Sen. 640, 644); *ditto* where children are made joint tenants with [strangers] of personalty: *In re Kerr's T.* (4 Ch. D. 600).

(4) B. appoints part to children and part to a child on trust for another child for life, then [for strangers, then] contingently to a child: *Alexander* v. *A.* (*ubi supra*); and see *In re Kerr's T.;* but see *In re Brown's T.* (1 Eq. 74). In *In re Meredith's T.* (3 Ch. D. 757) the strangers were also residuary legatees, and took as such.

(5) B. appoints part to children, [part to strangers, and in case the children will not share with the strangers, the whole is to go to two children] [payment to be made at twenty-five years of age]: *Sadler* v. *Pratt* (5 Sim. 632).

(6) B. appoints part [to a child, such part to be held by strangers on trust for him for life, remainder to strangers; in case this is invalid] to another child: *In re Crawshay* (43 Ch. D. 615). See (23).

(7) B. appoints to a child for life, remainder [to a stranger, C., when twenty-one; but] if C. dies under twenty-one, to another child: *Long* v. *Ovenden* (16 Ch. D. 691). In this case C. was an infant at the child's death, and the interest had consequently to be accumulated during his infancy.

(8) B. appoints land by will to a child for life, and [with remainder to] his issue in tail. The child takes an estate tail by the *cy-près*

doctrine: *Line* v. *Hall* (43 L. J. Ch. 107). Compare *Pitt* v. *Jackson* (2 Bro. C. C. 51).

(9) B. appoints personalty or realty [to a stranger for life, and] after his death to a child: *Dictum* in *Crozier* v. *C.* (3 D. & W. 365).

(10) B. being the child's guardian, and rich, appoints to his children: *In re De Hoghton* ([1896] 2 Ch. 385). See *ante*, p. 161.

(11) B. revocably appoints to his (healthy) child, aged three, which dies shortly after, so that the father takes: *Beere* v. *Hoffmister* (23 Beav. 101).

(12) [B. appoints to his child, who is mad and likely to die, and dies soon]: *Wellesley* v. *Earl of Mornington* (2 K. & J. 143); and see *Lord Hinchinbrooke* v. *Seymour*, as cited in *Henty* v. *Wrey* (pp. 339–349).

(13) [B. appoints to her child in order that she and its father may bring presumptive undue influence to bear on it and the father may get it]: *In re Marsden's T.* (4 Drew. 594). (*Sed quære*, for the father would not get it if presumptive undue influence were used.)

(14) [B. appoints to a child, who then pays it to the trustees in discharge of premiums payable by B.]: *Harrison* v. *Randall* (9 Ha. 397); [or joins in charging it in B.'s favour]: *Pares* v. *P.* (33 L. J. Ch. 215). See (39). Compare *Jackson* v. *J.* (7 Ch. & F. 977).

(15) [B. appoints two *x.* to child, who then joins B. in settling *x.* on other child and strangers]: *Salmon* v. *Gibbs* (3 D. & S. 343).

(16) B. appoints [two] *x.* to child [in order that *x.* may go to pay debts of a stranger]: *Ranking* v. *Barnes* (33 L. J. Ch. 539).

(17) B. appoints to child, who then joins B. in granting leases and reconveys to trustees: *In re Huish's Charity* (10 Eq. 5). For (14–17) see (33).

II. to children with charges in favour of others;

II.—(18) B. appoints to a child charged with £3000 for other children [and a stranger]: *Bruce* v. *B.* (11 Eq. 371).

(19) B. appoints [£100 to a stranger, and] the balance (£260) [for payment of a stranger's debts, and the surplus] to a child: *In re Jeaffreson's T.* (2 Eq. 276). Compare *In re Harries' T.* (Joh. 199).

(20) B. appoints land to his children by will [charged with B.'s debts], *Cowx* v. *Foster* (1 J. & H. 30), [and appoints £200 to a child in order to pay B.'s debts]: *Hay* v. *Watkins* (3 Dr. & W. 339). See (39).

(21) B. appoints [subject to any exercise of a delegated and invalid power of appointment] to children: *Carr* v. *Atkinson* (14 Eq. 397); *Webb* v. *Sadler* (8 Ch. 419), cited in *In re Abbott* ([1893] 1 Ch. 57–58).

III. or directions in favour of others;

III.—(22) B. appoints to children [and directs that their shares shall be settled]: *Churchill* v. *C.* (5 Eq. 44); *Woolridge* v. *W.* (Joh. 63); *Watt* v. *Creyke* (3 Sm. & G. 362).

(23) B. appoints to a child [" who I am assured will settle it on another child and strangers "] and he does so settle it: *In re Crawshay* (43 Ch. D. 615). See (6).

(24) B. appoints to a child subject to annuities to the others [and

to a request to settle £100 p.a. on strangers]: *Viant* v. *Cooper* (76 L. T. 768).

(25) [B. appoints to a stranger, with directions to maintain the children until twenty-one], then to children: *Lloyd* v. *L.* (26 Beav. 96); *Chester* v. *Chadwick* (13 Sim. 102).

IV. or conditions in favour of others;

IV.—(26) B. appoints to a child on condition that she makes certain payments to other children, and, subject to an executory limitation, to other children should she refuse: *Stroud* v. *Norman* (Kay, 313). Hotchpot clauses are valid: *In re Buckley's T.* ([1893] W. N. 95).

(27) B. devises land [to a stranger for life], upon condition that the children should be maintained out of the rents and should be paid legacies out of the accumulations [the surplus income being impliedly given to the stranger]: *Crozier* v. *C.* (3 Dr. & W. 353). (As to how such gifts are construed when valid throughout, see *In re G.* ([1899] 1 Ch. 719, 724, 725); *In re Yates* ([1901] 2 Ch. 438).)

(28) B. appoints to a child [on condition that he release a debt] (29) [or pay money to a stranger]: *Alexander* v. *A.* (2 Ves. Sen. 644).

(30) [B. appoints to two children on condition that they release a debt due from B.'s estate], [and in case of refusal to a third child]: *In re Perkins* ([1893] 1 Ch. 283); *Reid* v. *R.* (25 B. 469, 479); *Rowley* v. *R.* (Kay, 242).

(31) B. appoints to children [on condition and under an agreement that they resettle the property on themselves and strangers], which they do. B. had offered in Court to appoint without the condition annexed: *In re Turner's S. E.* (28 Ch. D. 205). This was not a marriage settlement, as in (40).

(32) B. appoints to a child on condition that she does not marry a Christian, turn nun, etc.: *Hodgson* v. *Halford* (11 Ch. D. 959)†; *Wainwright* v. *Miller* ([1897] 2 Ch. 255). (These conditions, if not against public policy, are supported.)

V. or subject to an agreement to benefit others.

V.—(33) *Query:* are cases (14) to (17) implied agreements? See *Jackson* v. *J.*, *Salmon* v. *Gibbs.* Compare (36–40).

(34) [B. appoints policy to child under an agreement to surrender it and pay proceeds to him]: *In re Deane* (42 Ch. D. 9), (measure of damages).

(35) B. covenants to exercise a power by will and exercises it in favour of the child: *Bulteel* v. *Plummer* (6 Ch. 160); *Thacker* v. *Key* (8 Eq. 408); *Palmer* v. *Locke* (15 Ch. D. 294). See *In re Parkin* ([1892] 3 Ch. 510), for measure of damages, if this contract is valid (?)

(36) B. (in 1863) appoints to a child not about to marry, and by the same deed the property is resettled on the child and on strangers; the child disputed the resettlement, but executed the deed after B.'s death in 1871. The resettlement was, until 1871, invalid: *Roach* v. *Trood* (3 Ch. D. 429).

(37) [B. appoints to children not about to marry, and they then settle the property on themselves and strangers, in pursuance of an agreement with B.]: *Pryor* v. *P.* (2 D. J. & S. 205).

(38) [B. appoints money to a child knowing that she means to pay her husband's debts with it]: *Molyneux* v. *Fletcher* ([1898] 1 Q. B. 648).

(39) [B. appoints to a child about to marry on usual trusts, but subject to a charge for B.'s second wife; this is in pursuance of an agreement]: *Carver* v. *Richards* (1 D. F. & J. 548); *In re Kirwan's T.* (25 Ch. D. 373). [Further, an appointment by will to the child absolutely is tainted by the agreement]: *ib.*, but see *Pares* v. *P.* (14); (where one appointment is bad, another to the same person will lie under suspicion): *Topham* v. *Duke of Portland* (5 Ch. 40).

(40) B. appoints to his or her children about to marry, and the child, or B. for the child, settles the property immediately afterwards or in the same deed on usual settlement trusts: *Routledge* v. *Dorril* (2 Ves. Jr. 357); *ditto* where the child is an infant daughter: *Fitzroy* v. *The Duke of Richmond* (27 B. 190); *ditto* if appointment is to trustees of marriage settlement of daughter: *Daniel* v. *Arkwright* (2 H. & M. 95); *Wright* v. *Goff* (22 B. 207). *M. W. P. Act*, 1882, settles property which would be settled but for that Act (sect. 19). In these cases B. must not reserve benefits: see (14), (20), (30), (34), (39); *Cooper* v. *C.* (5 Ch. 203); *ante*, p. 113.

Illusory and exclusive appointments.

An appointment is now valid, though (*a*) only a nominal share is given to one or more of the objects of the power: *Illusory Appointments Act*, 1830; (*b*) and though an object of the power is altogether excluded: *Powers Amendment Act*, 1874. The first Act was commented on in *In re Capon's T.* (10 Ch. D. 484) and *Bulteel* v. *Plummer* (6 Ch. 160); the second in *In re Deakin* ([1894] 3 Ch. 565), followed in *In re Jeans* (72 L. T. 835).

Release of powers.

By sect. 52 of the *C. Act*, 1881, which is retrospective, the donee of a power, whether coupled with an interest or not, may by deed release or contract not to exercise the power, and by sect. 6 of the *C. Act*, 1882, a similar power is given to the donee to disclaim, and on such disclaimer the power may be exercised by the other or others or the survivor of the other or others of the donees, unless the instrument creating the power expresses a contrary intention. A "trust power" (see p. 159) cannot be released; but where the power is not coupled with a duty it may be released, though some benefit may thereby accrue to the donee; and the doctrine applicable to fraudulent appointments does not apply: *In re Somes* ([1896] 1 Ch. 250); *In re Radcliffe* ([1892] 1 Ch. 227); but see *In re Little* (40 Ch. D. 418).

Jointuring powers and construction of certain other powers.

Recent cases have discussed the application of the above principles to powers of jointuring, *Whelan* v. *Palmer* (39 Ch. D. 648); and have construed special powers of jointuring, *In re De Hoghton* ([1896] 2 Ch. 385) (= rent-charge to widow); advancement, *Molyneaux* v. *Fletcher, supra*; maintenance, *In re G., supra*; appointing to a wife, *In re Hancock* ([1896] 2 Ch. 173) (= one); or "any wife," *Duchess of Marlborough* v. *Duke of M.* ([1901] 1 Ch. 165) (= two simultaneously).

Infants.

An infant may by deed exercise a collateral power over realty and personalty, and a power in gross over personalty, but not a power in gross over realty, see *In re Cardross' S.* (7 Ch. D. 728); *In re D'Angibau* (15 Ch. D. 228), and not a power appendant or appurtenant. These different kinds of powers are defined in *In re D'Angibau* (p. 232). As to powers of appointing guardians, see *ante*, p. 101.

Conflict of laws.

A French lady may exercise a general power given by an English settlement (*ante*, p. 5) over property which the French law of *legitim* does not allow her to dispose of: *In re Mégret* ([1901] 1 Ch. 547; *Pouey* v. *Hordern* ([1900] 1 Ch. 492). She may exercise it by an English will invalid in France (*ib.*), or by a French will, *In re Price* ([1900] 1 Ch. 442)†, unless the settlement prescribes special formalities which are not complied with: *Barretto* v. *Young* ([1900] 2 Ch. 339). If special formalities are complied with the power is executed, although by the law of the domicil the instrument is invalid: *In the Goods of Huber* ([1896] P. 209). In *In re Price* the will was construed according to the *lex loci solutionis, i.e.* England. The rule in *In re Kirwan's T.* (25 Ch. D. 373) and *Hummel* v. *H.* ([1898] 1 Ch. 642) only prescribes that wills by Britons abroad must be in English form, in order to execute an English power of appointment. See *In re Price.*

See Farwell on Powers, 2nd ed. pp. 293, *et seq.* 374–377, and ch. 10.

Agents to the Trust Constructive Trustees.

BARNES *v.* ADDY.

(9 Ch. 244.)

Principle.

A stranger to a trust acting as agent of the trustees in transactions within their legal powers may be held liable as a constructive trustee, if he receives and becomes chargeable with part of the trust property, and will be held liable if he acts with knowledge of a dishonest and fraudulent design on the part of the trustees.

Summary of facts.

Addy was the sole surviving trustee of a fund under a will which gave him a power of appointing new trustees, but no power of reducing their number. One moiety of the fund, spoken of as the "Addy" share, was held for the benefit of Mrs. Addy and her children; the other moiety, spoken of as the "Barnes" share, for the benefit of Mrs. Barnes and her children.

Family disputes having arisen, Addy desired to appoint Barnes in his place as sole trustee of the Barnes fund. His solicitor advised him not to do so, and pointed out the risk of the misapplication of the trust fund when it was in the power of a sole trustee; but Addy persisted in his intention. Addy's solicitor, on his instructions, drew up a deed of appointment and indemnity, but required that it should be approved by an independent solicitor on behalf of Mrs. Barnes and her children. Barnes' solicitor, acting on behalf of Mrs. Barnes and her children, warned her of the risk of the proposed transaction, but on her replying that she fully understood the matter and desired it to be carried through, approved the deed on her behalf. Addy's solicitor then introduced Barnes to a broker, and Addy transferred the "Barnes" share to Barnes. The next day Barnes misappropriated the whole of the "Barnes" share, and subsequently became bankrupt. The solicitors had no knowledge of any fraudulent design on the part of Barnes. The C. A. decided that they were not liable for Barnes' misappropriation.

This case defines the position of solicitors to a trust, but its principles extend to all other agents for trustees. Thus Lord Selborne, L.C., in delivering judgment, said: "In this case we have to deal with certain persons who are trustees, and with certain other persons who are not trustees. That is a distinction to be borne in mind throughout the case. Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees *de son tort* or actually participating in any fraudulent conduct of the trustee to the injury of the *c.q.t.* But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees. . . . If those principles were disregarded I know not how any one could in transactions admitting of doubt as to the view which a Court of Equity might take of them, safely discharge the office of solicitor, of banker, or of agent of any sort to trustees." Thus to hold one solicitor liable on account of his preparation and approval of the deed would, it was said, render it impossible for any person safely to act as a solicitor for any retiring or incoming trustee unless he took upon himself the office of a Court of Equity and satisfied himself that nothing in the transaction could possibly be called in question. The case against the other solicitor carried the point very little further. He knew that as a general rule it was not a safe thing to hand over a trust fund to a single trustee, he advised against it, and he prepared a deed of indemnity. To hold that a solicitor in such a case was a constructive trustee would be an alarming and novel doctrine. "I have long thought," said James, L.J., "that this Court has in some cases gone to the very verge of justice in making good to *c.q.t.* the consequences of the breaches of trust of their trustees at the expense of persons perfectly honest, but who have been in some more or less degree injudicious. I do not think it is for the good of *c.q.t.* or the good of the world that those cases should be extended."

Cases of no constructive trust.

The following were cases in which attempts were made to apply the doctrine of constructive trusts beyond the limits defined by *Barnes* v. *Addy* :—

Bankers.

(1) In *Gray* v. *Johnston* (L. R. 3 H. L. 1) the trustee (T.) was executor, and the alleged constructive trustee banker (B.). T. transferred the balance on her executorship account with B. to a partnership account with B. In refusing to make the bank liable, Lord Cairns stated the law thus: "There must, in the first place, be some misapplication, some breach of trust intended by the executor, and there must, in the second place, as was said by Sir J. Leach in the well-known case of *Keane* v. *Robarts* (4 Madd. 357), be proof that the bankers are privy to the intent to make this misapplication of the trust funds," and added, "if it be shown that any personal benefit to the bankers themselves is *designed* or *stipulated for*, that circumstance, above all others, will most readily establish the fact that the bankers are in privity with the breach of trust which is about to be committed."

(2) This case was followed in *Coleman* v. *Bucks Union B.* ([1897] 2 Ch. 243), where B. was first told that the money in question was T.'s trust account, then that it was part of T.'s private account. Compare *Thompson* v. *Clydesdale B.* ([1893] A. C. 282); and *post*, Note II. p. 193.

Money under joint control at bank.

(3) In *In re Barney* ([1892] 2 Ch. 265) T. could not draw trust money out of a bank unless her cheques were initialed by two friends; but Kekewich, J., refused to make the two friends liable for the loss of the proceeds of her cheques, as the money was not vested in them;

and allowed them to retain trust moneys paid them *quâ* private creditors or *quâ* trustees of a creditor's trust deed.

Directors.

Speaking broadly, directors are not trustees. They do not own what they manage. Their duties are not subject to the same sanction as the duties of trustees: *In re Kingston C. M. Co.* ([1896] 1 Ch. 345, 346; 2 Ch. 279). In *Wilson* v. *Lord Bury* (5 Q. B. D. 518) A. was depositor in an investment company of which D. was director, and sought to recover from D. on the ground that there was a trust imposed upon the company to renew A.'s mortgage, and that the company having failed to renew, D. was liable. The Court held that there was no trust, and that even assuming that there was a trust as between A. and the company, D. being a stranger to the trust, and not having received any part of the moneys for his own benefit, nor had any suspicion of any improper design in the transaction, was not liable. Compare *Ferguson* v. *Wilson* (2 Ch. 77).

(4) Directors who have a duty to register mortgages, which duty is enforced by statutory penalties, are not constructive trustees for that purpose: *Wright* v. *Horton* (12 A. C. 371)*, approving *Knowle's Mortgage* (6 Ch. D. 556); *Globe Iron Co.'s Case* (48 L. J. Ch. 295). Hence such mortgages are valid even though the director is mortgagor (*ib.*); but see now 63 & 64 Vict. c. 48, ss. 14–18.

Solicitors.

(5) In *In re Spencer* (51 L. J. Ch. 271), in an action for administration, the solicitors for the trustees (S.) were joined as defendants because exorbitant sums had been allowed in the accounts as costs. Such an action is not maintainable; S. were not liable as constructive trustees, and the proper remedy was by petition for taxation of costs under sect. 39 and 41 of the *Solicitors Act*, 1843, such petitions to be made within twelve months: *In re Wellborne* ([1901] 1 Ch. 312). No leave to amend was given. Compare *Burstall* v. *Beyfus* (26 Ch. D. 35), and (4).

(6) In *In re Blundell* (40 Ch. D. 370), which was characterized by Stirling, J., as a case of great importance, not only to solicitors, but to all other agents (*e.g.* auctioneers and stockbrokers) employed and paid by trustees, the following principle was laid down: "A stranger to the trust receiving from the trustee what he knows to be part of the trust estate is not liable as a constructive trustee, unless there are facts brought home to him which show that to his knowledge the money is being applied in a manner which is inconsistent with the trust; or (in other words) unless it be made out that he is a party either to a fraud or to a breach of trust on the part of the trustee." Here, as in *In re Barney*, the agents were allowed to retain payments made out of the trust estate by the defaulting trustee for their services: although the trustee could not have made such retainer on his own behalf: and although the agents could not have retained such sums except under authority from the trustees: *Harries* v. *Rees* (37 L. J. Ch. 102); *Staniar* v. *Evans* (34 C. D. 470).

(7) In *Brinsden* v. *Williams* ([1894] 3 Ch. 185) S. received the mortgage money, lodged it at their bank, and paid it to the mortgagor.

The security was authorized by the trust, but insufficient. S. were not liable because they had not advised upon the sufficiency of the security. Compare *Rae* v. *Meek* (14 A. C. 558). See *ante*, p. 174.

(8) In *Fyler* v. *F.* (3 B. 550) S. advised an improper security from apparently interested motives, and were held not liable, but were deprived of costs.

(9) In *Mara* v. *Browne* ([1896] 1 Ch. 199) S. came within the exemption established by *Barnes* v. *Addy*, as he had acted (in the matter of certain improper mortgages) merely as agent. Yet it was at his instigation that the trust funds were lodged at a bank, and then paid to him for investment in the improper investments which had occasioned the loss complained of; and he might have been liable in tort for negligence. Contrast *Soar* v. *Ashwell* ([1893] 2 Q. B. 390); *Blyth* v. *Fladgate* ([1891] 1 Ch. 337).

Solicitor's partners.

(10) A second point raised in *Mara* v. *Browne* was whether if S. had been held to be a constructive trustee his partners would have been liable. Reliance was placed (1) upon the fact that letters in the matter had been addressed to and written in the name of the firm, but see *Cleather* v. *Twisden* (28 Ch. D. 340). (2) The books of the firm (kept, it is true, by S.) showed the money as money paid by the firm to the mortgagee. The liability of the other partners would have been clear if, as in *Rhodes* v. *Moules* ([1895] 1 Ch. 236), the solicitors had habitually acted as mortgage-brokers; or if, as in *Blyth* v. *Fladgate* ([1891] 1 Ch. 337), the moneys received had been paid into the account of the partners. But neither of these circumstances occurred in this case, and the C. A. leant against this view.

Cases of constructive trust.

The following cases, in which constructive trusts were created, fall well within the limits defined by *Barnes* v. *Addy*:—

Bankers.

(11) Bankers (B.) allowed tenant for life to draw on trust account of trustees (T.): *Bridgman* v. *Gill* (24 B. 302). Note II., *infra*.

(12) B. allowed T. to transfer the balance on what B. knew to be T.'s trust account to T.'s private account: *Pannell* v. *Hurley* (2 Coll. C. C. 241) distinguished in *Coleman* v. *Bucks* (*ubi supra*), *Foxton* v. *Manchester Banking Co.* (44 L. T. (N. S.) 406), and *Bodenham* v. *Hoskyns* (2 D. M. & G. 903) (where T. was receiver).

Directors.

(13) Directors apply or misapply funds committed to their control subject to the same sanction as trustees. In this sense only are they trustees. "Directors are trustees of the powers committed to them as, *e.g.*, of the power of approving transfers of shares, of the power of allotment of shares, of the power of employing the funds of the company," *In re Lands Allotments Co.* ([1894] 1 Ch. 616): distinguish *In re Severn Ry. Co.* ([1896] 1 Ch. 559); *In re Nat. Bank of Wales* ([1899] 2 Ch. 629); S. C. nomine, *Dovey* v. *Cory* ([1901] A. C. 477) "of the power of making calls or receiving payment of calls in advance, of the power of forfeiting shares, and as trustees they may be rendered liable for their misuse:" Buckley on Companies, 6th ed. pp. 496, 497; *ante*, pp. 83, 84; *post*, pp. 204, 366, 367. Compare Vaughan Williams, J., in *In re Kingston C. M. Co.* ([1896] 1 Ch. 347).

Various agents.

(14) The agent who made himself trustee *de sou tort* was town clerk in *A.-G.* v. *Leicester Corp.* (7 B. 176), commercial correspondent in *Wilson* v. *Moore* (1 My. & K. 126, 337).

Partners in business.

(15) A. B. C. D. were partners. A. died, appointing B. C. his trustees with power to continue his capital in the firm. D. retired; yet the new firm, B. C., retained A.'s capital, and after releasing D. from liability therefor, lost it. D. was liable: *Smith* v. *Patrick* ([1901] A. C. 282).

Purchaser.

(16) A purchaser who pays money to one of three trustees and the trustee absconds is liable: *Webb* v. *Ledsam* (1 K. & J. 385).

Tenant for life.

(17) T. at the instigation of tenant for life (A.) invests trust money improperly on an equitable mortgage to A. A.'s interest, assigned for value to a purchaser with notice, may be impounded, *Bolton* v. *Curre* ([1895] 1 Ch. 544): compare *In re Dixon* ([1900] 2 Ch. 561); and if A. is a solicitor he may be suspended for two years: Trevor & Lake's Solicitors Act, 1888, p. 160.

Solicitor.

(18) In *Lee* v. *Sankey* (15 Eq. 204) S. received trust funds as agents for the co-executors and co-trustees of the estate of a testator, and paid over proceeds of the sale of real estate (part of the trust funds) to one only of the co-executors and co-trustees, and were held liable for the loss which resulted from this breach of trust.

(19) In *In re Champion* ([1893] 1 Ch. 101) two persons (who were also trustees) mortgaged property to S., who "had notice" that this mortgage was a breach of trust. That is to say, S. knew the contents of the will which settled the property, but mistook their meaning, and consequently paid part of the mortgage money to the wrong persons. It was held that, in subsequently selling the property, he sold as constructive trustee for the beneficiaries, and that the latter could follow and claim all the purchase money which their constructive trustee had received, *minus* such part of the mortgage money as had been credited by the mortgagors to the trust estate.

(20) In *Blyth* v. *Fladgate*, *Soar* v. *Ashwell*, S. acted as principals, and received the trust money as such. Similarly in *Hardy* v. *Ealey* (33 B. 365) and *Burdick* v. *Garrick* (5 Ch. 233) (implied trustee). The partners were held liable in *Dundonald* v. *Masterman* (7 Eq. 504), *Blyth* v. *Fladgate*, etc.

Parties.

(21) As between persons appointed trustees and persons who have become constructive trustees of an estate there is no primary and secondary liability, but all are equally liable for a breach of trust: *Cowper* v. *Stoneham* (68 L. T. 18)†.

(22) "The liability arising out of a breach of trust is not joint merely, but joint and several: *Wilson* v. *Moore*, 1 My. & Keane, 126, 337:" per Stirling, J., *Blyth* v. *Fladgate* ([1891] 1 Ch. 337, 353).

(23) But those who receive the trust fund (whether co-trustees or constructive trustees) may be compelled to indemnify innocent trustees, *Chillingworth* v. *Chambers* ([1896] 1 Ch. 685); *Moxham* v. *Grant* ([1900] 1 Q. B. 88) (directors), but not by third party procedure under O. xvi. r. 48: *Wynne* v. *Tempest* ([1897] 1 Ch. 697),

post, p. 327. This principle is akin to those discussed in next chapter. It has also been extended to make the active trustee indemnify the passive trustee, especially if he is a solicitor, *Lockhart* v. *Reilly* (25 L. J. Ch. 697); *Thompson* v. *Finch* (8 D. M. & G. 560); *In re Turner* ([1897] 1 Ch. 536), but not merely because he is solicitor, *Head* v. *Gould* ([1898] 2 Ch. 250), nor merely because he is the "acting trustee:" *Bahin* v. *Hughes* (31 Ch. D. 390); *Robinson* v. *Harkin* ([1896] 2 Ch. 415).

(24) In agent's cases *c.q.t.* must sue trustee as well as agent: *Robertson* v. *Armstrong* (28 B. 123).

Statute of Limitations.

(25) A constructive trustee is in the same position as an express trustee for the purposes of the Statutes of Limitation: *Soar* v. *Ashwell*, citing *In re Bell* (34 Ch. D. 462), and other cases. See *post*, p. 204.

NOTE I.

The liability of a trustee or constructive trustee who has lost trust funds to replace them is not a debt in the proper sense of the word debt: *Ex p. Dyer* ([1901] 1 K. B. 710). *C.q.t.* who proceed to enforce this liability do not abandon other remedies, *e.g.* those *post*, p. 194, *et seq.*: *Francis* v. *F.* (5 D. M. & G. 108).

NOTE II.—*On Bankers.*

The consequence of the decision in *Foley* v. *Hill* (2 H. L. C. 28)*, that equity does not interfere between customers and banker—he being neither trustee nor fiduciary agent—is that the banker may treat the two accounts of one customer as one, and write off the deficit of one against the balance of the other, *Union Bank of Australia* v. *Murray-Aynsley* ([1898] A. C. 693); *Mutton* v. *Peat* ([1900] 2 Ch. 79), unless the bankers know that one account is a trust account and who are the *c.q.t.*: *Ex p. Kingston* (6 Ch. 632). The mere title "trust account" would, *ib.*, *Foxton* v. *Manchester Banking Co.* (44 L. T. 406), the knowledge that the client was a stockbroker and that the cheque paid in represented the sale of shares would not, convey this knowledge: *Thomson* v. *Clydesdale B.* ([1893] A. C. 282). See *London Loan Agency* v. *Duggan*, cited *post*, p. 365. A transfer from a trust to a private account at customer's request will be allowed, *Coleman* v. *Bucks U. B.*, unless it is for the obvious purpose of extinguishing an overdraft: *Pannell* v. *Hurley*; *Badenham* v. *Hoskyns* (where the bank knew who were *c.q.t.*); *Foxton* v. *Manchester Banking Co.* (where there were three separate private accounts and one joint trust account) (cited *ante*, (2)). In *Magnus* v. *Queensland Nat. B.* (37 Ch. D. 466) the bankers were liable because they acted like the purchaser in (16), *supra*.

Following Trust Fund.

In re HALLETT'S ESTATE: KNATCHBULL *v.* HALLETT.

(13 Ch. D. 696.)

Principle.

Property intrusted to a person in a fiduciary relation may be followed as long as it can be traced.

When a person holding money as trustee or in a fiduciary character mixes it with his own, and draws out of the mixed fund for his own purposes, the Court presumes that his drawings are first coming out of his own money.

Summary of facts.

H., a solicitor, had bonds for £2145 belonging to C., and for £770 representing T.'s improperly converted trust funds, in his possession. He improperly sold first C.'s, then T.'s bonds, and paid the proceeds to his general balance at his bankers, and drew cheques for his own purposes. He afterwards paid in other moneys of his own, so that his balance at his bank was never less than £2915, and was at his death £3029. But for such payments in, his balance at his death would have been £1708. It was held by the C. A. that T. and C. had a right "to follow the money," and were entitled to a charge on the £3029.

Modern doctrine of equity.

In this important case, Jessel, M.R., elaborately stated "the modern doctrine of equity as regards property disposed of by persons in a fiduciary position," which was, as he said, very clear and well established.

Six methods of following trust funds.

In the first place the remedies for a breach of trust as summarized by Jessel, M.R., may be considered under six heads. The first two heads include cases where the trust fund is dealt with without being mixed with other funds; the last four heads include cases where mixture occurs, but where "a refinement of equity" enables the Court to regard the trust fund as distinct and to trace its metamorphoses. The rules may be stated thus:—

(1) Proceeds of sale of trust property.

(1) Where property has been wrongfully disposed of by a trustee, the *c.q.t.* may take the proceeds of the sale if he can identify them. This rule is borrowed from that which prevails when the disposition is rightful: *In re Benson* ([1899] 1 Ch. 39)†.

(2) Purchases with trust money.

(2) Where purchases of land, stock, or chattels are made with trust money exclusively, the *c.q.t.* may take the property purchased or hold it as a security for the amount of trust money laid out in the purchase, or, as it is generally expressed, he is entitled at his election either to take the property or to have a charge on it for the amount of the trust money: *Lane* v. *Dighton* (Amb. 409); *Trench* v. *Harrison* (17 Si. III.); *Hopper* v. *Conyers* (2 Eq. 549) (land). In *Harris* v. *Truman* (9 Q. B. D. 264) the factor had bought similar goods with his own money or on credit, and then converted the fiduciary money. The goods were followed. So in *Taylor* v. *Plumer* (3 M. & S. 562) (stockbrokers' shares); *In re Turcan* (40 Ch. D. 5) (purchases by covenantor to settle); *G.E.R. Co.* v. *Turner* (8 Ch. 149) (director's *ultra vires* purchases). The *c.q.t.* retains this lien until the property is sold to make good the breach, *Learoyd* v. *Whiteley*, *In re Salmon*, cited in *In re Turner* ([1897] 1 Ch. 536, 543). He has an equitable interest or estate in the land or chattels: *Cave* v. *C.* (15 Ch. D. 639, 647). But this estate or interest is defeated by sale to a purchaser with notice, if at the date of the sale the beneficiaries do not or cannot elect to take the property in specie: *Power* v. *Banks* ([1901] 2 Ch. 487), citing *In re Patten & Edmonton U.* (52 L. J. Ch. 787).

(3) Purchases with trust and other money.

(3) When the trust money has been first mixed with the trustee's own money, and property has been purchased with the mixed fund, the *c.q.t.* is entitled to a charge on the property purchased for the amount of the trust money laid out in the purchase. Compare *Hughes* v. *Wells* (9 Ha. 749); *Birds* v. *Askey* (24 B. 618); *Price* v. *Blakemore* (6 B. 507) (land); *Harford* v. *Lloyd* (20 B. 310) (administrator buys *post-obits*); *Ex parte Wetherall* (4 Ch. D. 49); *In re Vernon* (33 Ch. D. 402) (solicitor's mortgages); *In re Mouat* ([1899] 1 Ch. 831) (stock of assignee in fraud of creditors). Liens on chattels must be registered: *Coburn* v. *Collins* (35 Ch. D. 373), *infra*, p. 262.

4) Proceeds of sale of trust and other property.

(4) The converse rule that, where trust property is sold and mixed with vendor's money, the *c.q.t.* is entitled to the proceeds, *In re Champion* ([1893] 1 Ch. 101), depends on the principle that where trust money is mixed with other moneys of a trustee, either in his own hands or in the hands of a bailee, it is still regarded as separate for purposes of equity. "Does it," said Jessel, M.R., "make any difference according to the modern doctrine of equity? I say none. It would be very remarkable if it were to do so. Supposing the trust money was a thousand sovereigns, and the trustee put them in a bag, and by mistake or accident or otherwise dropped a sovereign of his own

into the bag, could any one suppose that a judge in equity would find any difficulty in saying that the *c.q.t.* has a right to take a thousand sovereigns out of the bag? I do not like to call it a charge of a thousand sovereigns on the thousand and one sovereigns, but this is the effect of it." The same principle, he went on to say, would apply if the trustee instead of putting the money into a bag carried it to his bankers, or lent it without security, or on a promissory note or bond. In these cases the *c.q.t.* would own, or, if the trust money were mixed with other money, have a charge for the amount of the trust money on the balance in the bank, debt, promissory note, or bond. "There is no difficulty then in following out the rules of equity and in deciding that in the case of a mere bailee you can follow the money." This principle had or has been applied to the banking accounts of bankers employed as special agents to collect and remit money, *Ex p. Plitt* (37 W. R. 463): compare *Ex p. Pease* (1 Rose 232); *Ex p. Dale* (11 Ch. D. 772); but see *Ex p. Neck* (13 Q. B. D. 740); of land agents, *Lyell* v. *Kennedy* (14 A. C. 437, 459); land-jobbers, *Birt* v. *Burt* (11 Ch. D. 773, n.); solicitors, *In re Murray* (57 L. T. 223), and stockbrokers: *Ex p. Cooke* (4 Ch. D. 123); *Hancock* v. *Smith* (41 Ch. D. 456); so that *Whitecomb* v. *Jacob* (1 Salk 161) (factor's money) and six other cases, which asserted that "in regard that money has no ear-mark equity cannot follow that in behalf of" the principal or customer, are superseded.

(3) and (4) "If a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own:" per Jessel, M.R., at p. 719, citing Wood, V.C., in *Frith* v. *Cartland* (Q. H. & M. 417). Compare *Lupton* v. *White* (15 Ves. 432).

(5) Drawing on trust and other money at a bank, where balance exceeds trust funds,

(5) Suppose after mixing the trust funds with funds of his own at a bank the trustee draws cheques on his banker for his private expenses; so long as there are funds of his own at the bank it must be presumed that the trustee drew his cheque on his own funds and did not touch the trust funds. This is an application of the maxim, "*allegans suam turpitudinem non est audiendus*," and is stated thus by Jessel, M.R.:— "When we come to apply that principle to the case of a trustee who has blended trust moneys with his own, it seems to me perfectly plain that he cannot be heard to say that he took away the trust money when he had a right to take away his own money. The simplest case put is the mingling of trust moneys in a bag with money of the trustee's own. Suppose he has a hundred sovereigns in a bag, and he adds to them another hundred sovereigns of his own, so that they are commingled in such a way that they cannot be distinguished, and the next day he draws out for his own purposes £100, is it tolerable for anybody to allege that what he drew out was the first £100, the trust money, and that he misappropriated it and left his own £100 in the bag? It is obvious that he must have taken away that which he had a right to take away, his own £100. What difference does it make if instead of being in a bag he deposits it with his banker, and then pays

in other money of his own and draws out some money for his own purposes? Could he say that he had actually drawn out anything but his own money? His money was there, and he had a right to draw it out, and why should the natural act of simply drawing out the money be attributed to anything except to his ownership of money which was at its banker's?" On this point the Court rightly declined to be bound by *Pennell* v. *Deffell* (4 D. M. & G. 372).

(6) where trust funds exceed balance.

(6) The Court of First Instance had rightly held that as between *c.q.t.*—in cases where the fund has been improperly drawn on—appropriation is presumed according to the rules in *Clayton's case* (1 Mer. 572)*, which are, (1) that debtors may appropriate payments; otherwise (2) creditors may do so at the time of payment: *Thompson* v. *Hudson* (6 Ch. 320). Otherwise (3) it is presumed that sums first paid in are written off against the earliest debts, or are first drawn out; (4) unless circumstances, *e.g.* the giving of securities, point to a different conclusion: *City Discount Co.* v. *Maclean* (L. R. 9 C. P. 692); (5) or creditors reserve the right to make some future appropriation, *e.g.* by going to law: *Commercial Bank of Australia* v. *Wilson* ([1893] A. C. 181); *Cory* v. *Mecca* ([1897] A. C. 286); or (6) the "earliest debts" are fraudulent: *Lacy* v. *Hill* (4 Ch. D. 537, 3 A. C. 94). Appropriation communicated to the other side is final: *Cory* v. *Mecca.* The third rule which is especially applicable to current accounts (*ib.*) was approved here and applied as between *c.q.t.* in *Hancock* v. *Smith* (41 Ch. D. 456), and as a second *ratio decidendi* in *In re Stenning* ([1895] 2 Ch. 433).

(5) and (6)

(5) and (6) If in the l.c. Hallett's balance had at any time been less than £2915, would the Court have held that the subsequent payments were meant to replace the trust fund? or would it have applied this third rule in Clayton's case? We can only answer that the second alternative had already been adopted by the C. A. in *Brown* v. *Adams* (4 Ch. 764), for reasons which the Court disapproved of in the l.c.

These six methods can be adopted with regard to fiduciary property.

In the second place, Thesiger, L.J., said in the l.c., "The principles relating to the following of trust property are equally applicable to the case of a trustee . . . and to the case of factors, bailees, or other kinds of agents." In his review of the older cases, *e.g. Whitecomb* v. *Jacob*, and *Ex parte Dale* (*ubi supra*), Jessel, M.R., showed that these cases were decided on the assumption that the same rule applied to trustees and *c.q.t.* on the one hand, and to other fiduciary agents and principals on the other hand. And Baggallay, L.J., in *New Zealand, etc., Land Co.* v. *Watson* (7 Q. B. D. 383) said: "There is no distinction as regards this doctrine between an express trustee or an agent or bailee standing in a similar fiduciary position."

Apparent exceptions in case of (*a*) current accounts of commission agents.

The cases which apparently cut down really reinforce the doctrines in the l.c. One class of cases (*a*) limit the agents to whom these rules are applicable. In *Kirkham* v. *Peel* (28 W. R. 941) a Manchester firm habitually consigned goods to a Bombay firm for sale either on behalf of the Bombay or of the Manchester firm, and claimed to follow and stock-brokers.

the proceeds of the latter sales. The Bombay firm dealt similarly with the Manchester firm, so that little money passed between the two firms. In disallowing this claim, Jessel, M.R., said: "The plaintiffs are ordinary merchants and commission agents . . . and they receive goods from anybody and trade on their own account, and everybody who sends goods to them knows this. No person in their position ever dreamt of keeping separate accounts at their bankers, and no consignor of goods ever dreamt of such a thing being done. . . . My observations in the case" (of *In re Hallett's Estate*) "had nothing whatever to do with the case of a commission merchant or agent. They were confined to the case of a bailee, commonly called a factor, who sells single articles, and whose special duty it is to remit the necessary proceeds to his principal." In *King* v. *Hutton* ([1900] 2 Q. B. 504) it was held that a client who speculated in differences through a broker could not follow his profits into the broker's accounts, as these profits represented a current account, not a single transaction.

(*b*) Agents taking commissions: the agent must be agent for purposes of this transaction;

(*b*) And the agents must be agents in *hac re* of the person defrauded. He must be agent in *hac re.* In *Lister* v. *Stubbs* (45 Ch. D. 1), Messrs. Lister & Co. employed their foreman Stubbs to buy materials for their business. Stubbs took commissions from the firms from which he bought and invested his commissions. Messrs. Lister & Co.'s claim to follow the commissions into these investments was rejected by Stirling, J., on the following grounds:—"I assume that the money could be recovered as money had and received to the use of the plaintiffs at law; but it is not a necessary consequence that the plaintiffs in this case could follow the money." "Until judgment" for money had and received "the money which had come to the hands of the defendant could not be treated as the money of the plaintiff:" per Stirling, J., *In re Mouat* ([1899] 1 Ch. 831, 835). Stubbs was something less than trustee and more than agent for his employer in respect of these receipts. See *In re Thorpe* ([1891] 2 Ch. 360). See *ante*, p. 82.

in case of investment agents, who are really borrowers;

He must be agent, and nothing more. In *In re Stenning* ([1895] 2 Ch. 433) a solicitor paid money produced by the sale of Mrs. S.'s securities into his own account, and paid interest upon it until his death. Mrs. S. then claimed to follow the money into deceased's banking balance. North, J., held "that the money which the testator had received for Mrs. S. was not held by him upon a trust for her," nor in a fiduciary capacity, "but that she allowed him to retain it as a loan from her upon which he was to pay her interest. This is conclusive against her claim." The solicitor did not act as an agent to invest, as he did in *In re Murray* (57 L. T. 223), where the facts are somewhat similar, but as the principal with whom the money was invested. The same judge, however, decided in the case of *Gilbert* v. *Gonard* (33 W. R. 302), which has not been the subject of judicial comment, that it was possible to combine both capacities, that of borrower and that of investing agent. "I do not," said North, J., "know any case, and no case has been referred to, in which there was precisely like this a duty undertaken by a person receiving the loan to apply it in a particular way. Probably therefore the circumstances of *Gilbert* v. *Gonard* are not likely to recur.

and in case of agents of others.

Again, the agent must be agent of the persons defrauded.

In *New Zealand, etc., Land Co.* v. *Watson* (7 Q. B. D. 374) plaintiffs, who grew corn in New Zealand, employed a *del credere* commission agent in Glasgow, who employed defendant, who was a factor in London, to sell their wheat for them. The proceeds of sale of wheat were traced in defendant's banking account, on the principle of rules 4 and 5 of the l.c., but the plaintiffs were not allowed to claim them, because defendant though an agent was not their agent.

(*c*) The trust (if any) must be a genuine trust.

(*c*) The trust (if there is a trust) must be *bonâ fide*. In *In re Great Berlin Steamboat Co.* (26 Ch. D. 616), Boden placed money to the credit of the company at their bankers for the purpose of enabling them to have a fictitious balance of a creditable amount in case inquiries were made. It was agreed that the money was not to be used by the company for general purposes, but that they were to hold it as trustees for Boden. The company went into liquidation. Cotton, L.J., said: "I think it the just result of the evidence that the balance now in dispute is ear-marked as part of the money which the appellant advanced. Then the appellant says that the company were to hold this sum in trust for him, and the resolution no doubt says that they shall;" but the trust was declared void, because it was not *bonâ fide*, and Boden had to prove along with the general creditors.

(*d*) The bailee, if any, must be a genuine bailee and not purchaser or creditor.

(*d*) The bailee (if there be one) must be a bailee, and nothing more; he must not be a *bonâ fide* purchaser for value. In *Collins* v. *Stimson* (11 Q. B. D. 142) Wilson paid into the bank money produced by a sale of his goods, and then became bankrupt. The sale was a fraud on his creditors within the meaning of the Bankruptcy Acts. He then entered into a contract in an assumed name for the purchase of land, and paid a deposit to the defendant, who was an auctioneer, by a cheque on the bank. He failed to complete his contract, thereby forfeiting the deposit to the vendor. Neither vendor nor defendant had notice of the fraud. It was held that the trustee in bankruptcy could not recover the deposit, which in the events that happened had become vested *bonâ fide* and for value in the defendant as agent for the purchaser. The expression "purchaser for value" includes creditor. Compare *Ex p. Dewhurst* (7 Ch. 185).

Trustees' cases.

The following are two cases of the application of this doctrine to trusts:—

Thorndike v. *Hunt.*

In *Thorndike* v. *Hunt* (3 De G. & J. 563), Hunt was trustee of two different trusts. He applied funds of the first trust to his own use, and then, procuring a power of attorney from his co-trustee in the second trust, he replaced the deficiency in the first trust fund by a transfer into that fund of a part of the funds of the second trust. A suit was brought in respect of breaches of trust in the first trust, and the trustees of that trust transferred the sum thus replaced into

Court. It was held that the transfer into Court was a transfer for valuable consideration without notice, and that consequently the *c.q.t.* under the second trust could not follow the trust fund. "There was," said Knight Bruce, L.J., "a debt due from the trustees." But see Note I., p. 193. "If the fund had not been transferred into Court, the property might have been obtained from them by other means."

Taylor v. *Blakelock.*

Thorndike v. *Hunt* was followed in *Taylor* v. *Blakelock* (32 Ch. D. 560). B. was co-trustee with A. of a will, and with C. of a settlement. B. misappropriated part of the settlement fund, and then applied an equal part of the will fund in the purchase of Stock in the joint names of himself and C. B. died insolvent, and A. then commenced an action against C. to have the stock transferred to him. The C. A. decided that A. had no right to "follow the trust fund," as C. must be treated as a purchaser for value without notice with the legal right to the stock. "The term 'purchaser for value,'" said Bowen, L.J., "is a well-known expression to the law. By the common law of this country the payment of an existing debt" (but see *ante*, p. 193) "is a payment for valuable consideration. . . . Commercial transactions are based upon that very idea."

Three bankers' cases.

The three following cases are illustrations of the same principle in the case of simple debts:—In *Mutton* v. *Peat* ([1900] 2 Ch. 79) a stockbroker (S.) had two accounts, a current account with £1362 balance, which included T.'s trust and fiduciary money, and an overdrawn loan account. S. deposited A.'s bonds with the Bank (B.) and became bankrupt. B. sold the bonds, which, after discharging the overdraft, produced a balance of £1485. It was held that T.'s right to follow his money into the £1485 was cancelled by B., the creditor, who had presumedly appropriated the £1362 to meet the overdraft. A. was therefore entitled to it.

In *Martin* v. *Rocke* (34 W. R. 253), an auctioneer paid into his general account with the defendants' bank money arising from the sale by auction of the plaintiff's cattle; but at the date of payment his general account was overdrawn. The bankers, therefore, who had no means of distinguishing the auctioneer's private money from the money entrusted to him by plaintiff, were creditors for value and without notice, not bailees of the auctioneer. They accordingly appropriated the amount paid in to extinguish the overdraft. The case, which is somewhat difficult to follow, was probably decided in favour of the bankers on this ground. But other grounds were also alleged.

Ex p. Blane ([1894] 2 Q. B. 237) surely comes within this rule. Blane and Hallett made Hallett & Co. their special agents to collect and receive the proceeds of company Debenture Stock, which was in process of being paid off and reissued. Other persons had made Hallett & Co. their special agents to buy a larger amount of the same debenture stock. Consequently Hallett & Co. had to pay more to the company than they had to receive from the company, and paid *this debt* with the amount receivable in respect of Blane and Hallett's share, plus a cheque of their own. They, however, credited Blane and Hallett's account with the value of the debenture stock. On Hallett & Co.'s bankruptcy Blane and Hallett could not claim this value, though the amount of cash in the bank with which Hallett & Co. banked exceeded the amount of their claim. But the *ratio decidendi* in *Ex p. Blane* was expressed in the following convenient maxim by Lord Esher, M.R. :—

(*e*) The funds must exist as such, and not be merely matters of account.

(*e*) "Had there been anything in existence representing that which the bankers were authorized to collect, Colonel Blane might have followed it; but all that can be shown is a settlement of account, and a settlement of account cannot be followed;" compare *ante*, p. 197(*a*). The money must be traced as money into the hands of the defaulting agent's bailee. On bankers' cases compare Note II., p. 193.

NOTE.—*Debtors Acts*, 1869–1878.

Debtors Acts.

The *Debtors Act*, 1869, which abolishes arrest or imprisonment for making default in payment of a sum of money, specifies six cases where the power of the Court to arrest or imprison still continues, among which are—sect. 4 (3), "Default by a trustee or person acting in a fiduciary capacity, and ordered by the High Court, *Marris* v. *Ingram* (13 Ch. D. 338), to pay any sum in his possession or under his control," *Preston* v. *Etherington* (37 Ch. D. 104); *In re Walker* (63 L. T. 237); *In re Fewster* ([1901] 1 Ch. 447); sect. 4 (4), default by a solicitor ordered to pay costs as penalty or other money as officer of the Court, *In re a Solicitor* ([1895] 2 Ch. 66). By the *Debtors Act*, 1878, s. 1, a discretion is conferred upon the Court in such cases to grant, refuse, stay or discharge either absolutely or on terms attachment, arrest, or imprisonment for these offences. Persons in a fiduciary capacity include a married administratrix, *In re Turnbull* ([1900] 1 Ch. 180); auctioneer, *Crowther* v. *Elgood* (34 Ch. D. 691); co-executor, *Evans* v. *Bear* (10 Ch. 76); manager, *Marris* v. *Ingram* (13 Ch. D. 338); receiver, *In re Gent* (40 Ch. D. 190); solicitor, *Litchfield* v. *Jones* (36 Ch. D. 530): a director, but not *quâ* shareholder, *Metcalfe's Case* (13 Ch. D. 815); partner, *Piddocke* v. *Burt* ([1894] 1 Ch. 343); promoter of company, *Phosphate Co.* v. *Hartmont* (25 W. R. 743); preferred creditor, *Ex p. Hooson* (8 Ch. 231). Cases on jurisdiction are—*Ferguson* v. *F.* (10 Ch. 661) (Ireland); *Esdaile* v. *Visser* (13 Ch. D. 421) (contempt); *Aylesford* v. *Poulett* ([1892] 2 Ch. 60) (peer); *In re Smith, Hands* v. *Andrews* ([1893] 2 Ch. 1) (bankrupt). The discretion which is thus conferred is illustrated by the above cases and by *Middleton* v. *Chichester* (6 Ch. 152); *Holroyde* v. *Garnett* (20 Ch. D. 532); *Ex p. Claxton* (8 Morrell, 221).

See as to the criminal liability of a fraudulent trustee, 24 & 25 Vict. c. 96, s. 80, 1 Edw. 7, c. 10, s. 1, and s. 27 of the *Bankruptcy Act*, 1890. See Robson on Bankruptcy.

Trustees' Statutes of Limitations.

THORNE *v.* HEARD.

([1893] 3 Ch. 530.)
([1894] 1 Ch. 599.)
([1895] A. C. 495.)

Principle.

Existing Statutes of Limitations apply to actions against a trustee for breach of trust except where the trustee (1) *has been party or privy to a fraud;* (2) *or retains the trust property or its proceeds; or* (3) *has received the same and converted it to his use.*

If fraud is relied on it must be fraud imputable to the person who invokes the aid of the Statute; and property is neither retained nor converted by a trustee, if his agent fraudulently converts it to his own use, and the trustee is not benefited thereby.

Summary of facts.

Heard was entitled to a first mortgage for £1000; Thorne to a second mortgage for £333; S., a solicitor who had negotiated and prepared both mortgages for all parties, was entitled to a third mortgage for £375 3*s.* 6*d.* Heard exercised his power of sale in 1878 and sold the property for £1700. S. conducted the sale and received the purchase money, out of which he paid £1000 to Heard and retained the residue, putting among Heard's papers a receipt signed by himself for payment of the £333 to Thorne, and of the £375 3*s.* 6*d.* to himself. S. converted the £700 to his own use, but paid interest on the £333 to Thorne until 1892, when he became bankrupt. Heard had no actual knowledge of the existence of Thorne's mortgage. Held by the Court of First Instance, by the C. A., and the House of Lords (*nem. con.*) that Heard was entitled to plead the Statute of Limitations, and was not liable to Thorne for the £333 and interest.

A mortgagee after exercising his power of sale is trustee of the surplus proceeds of sale for the parties interested in the Equity of Redemption, *post*, pp. 242, 243.

A mortgagee trustee of proceeds of sale.

Applying these principles to the l.c., Romer, J., and the C. A. held, but the House of Lords only assumed, that Heard had either knowledge or notice of Thorne's mortgage. Lord Herschell, L.C., questioned this view, and Lord Davey thought that the question of knowledge depended on whether Heard had read S.'s receipt. No question arose like that in *Magnus* v. *Queensland National Bank* (37 Ch. D. 466) as to whether Heard was entitled to rely on S.'s representation that the money payable to Thorne was payable to S. Romer, J., had held that Heard was negligent in not inquiring into S.'s authority to act for Thorne; and the Superior Courts unanimously confirmed this view. A solicitor should produce "a separate direction or authority from the person entitled to purchase-money" or else a deed "having in the body thereof or endorsed thereon a receipt:" *ante*, p. 172 (5), (6). Such being the inference from the facts, a breach of trust was clearly committed by Heard against Thorne in 1878. Was it barred or was it not barred by sect. 8 of the *Trustee Act*, 1888?

Breach of trust.

Formerly breaches of trust were not barred by the mere lapse of time. Equity only applied the older Statutes of Limitations "by analogy," *i.e.* to cases where the cause of action was similar to the cause of action at Common Law, although the remedy differed; only, therefore, to torts and contracts, not to breaches of trust: *Friend* v. *Young* ([1897] 2 Ch. 431), citing *Knox* v. *Gye* (L. R. 5 H. L. 656)*; *Thomson* v. *Eastwood* (2 A. C. 215). Sect. 1 and sect. 8 of the *Trustee Act*, 1888, which are the only sections of the Act which have survived, the rest of the Act having been repealed and re-enacted by the *Trustee Act*, 1893, for the first time applied Statutes of Limitations to breaches of trust; prior to this Act trustees could only rely on the vaguer principles of lâches, acquiescence, *Lindsay Petroleum Co.* v. *Hurst* (L. R. 5 P.C. 221) cited in *In re Taylor* (81 L. J. 812), release, and confirmation. The 8th section provides as follows:—

The T. Act, 1888, s. 8.

"Sect. 8.—(1) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof still retained by the trustee or previously received by the trustee and converted to his use, the following provisions shall apply:—

"(*a*) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him." And, it should be added, if the action were an action of contract: *How* v. *Winterton* ([1896] 2 Ch. 626).

"(*b*) If the action or other proceeding is brought to recover money or other property and is one to which no existing statute of limitations applies," the action or proceeding is regarded as though it were an action for money had and received; "but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use," but not against a beneficiary until entitled to possession.

Sect. 8 (3) makes this section apply to actions brought in and after 1890. Sect. 1 includes under "trustee" an executor, administrator, implied and constructive trustee, including a director of a company: *In re Sharpe* ([1892] 1 Ch. 154); *Seagram* v. *Tuck* (18 Ch. D. 296) (old law); *In re Lands' Allotment Co.* ([1894] 1 Ch. 616; *In re Nat. Prov. B. of Wales* ([1899] 2 Ch. 629, 663); liquidator, *In re Severn Ry. Co.* ([1896] 1 Ch. 559); promoter *In re Sale Hotel Co.* ([46 W. R. 314); but does not include a trustee in bankruptcy so as to exempt him from being called to account, *In re Cornish* ([1896] 1 Q. B. 99), nor the official trustee of charitable lands; and "trustee" includes "trustees." See *ante*, p. 193 (25).

Fraud.

With regard to the first exception to the rule that this statute can be pleaded, Heard had clearly not been party or privy to any fraud. But S. was his agent; had S.'s fraud implicated Heard?

Agent's fraud.

Fraud by an agent bound the principal in *Vane* v. *Vane* (8 Ch. 383); *Moore* v. *Knight* ([1891] 1 Ch. 547); following *Blair* v. *Bromley* (2 Ph. 354, 5 Ha. 542), and applying the general rules laid down in *Western B. of Sc.* v. *Addie* (L. R. 1 H. L. (Sc.) 145). In *Vane* v. *V.* a purchaser under a fraudulent deed was held not *bonâ fide*, because her father, who acted as her sole agent in negotiating the deed, knew and concealed its fraud. In *Moore* v. *Knight* money was deposited, in or about 1874, with a firm of solicitors for investment. In 1876 their managing clerk embezzled the money. One partner had died in 1877, and a receiver was appointed in 1878 for the purpose of winding up the partnership. Down to 1877 the firm, and after that date the two surviving partners, delivered accounts and paid interest on the supposed investments down to 1886, when they discovered the embezzlement. These accounts and payments were considered a representation by the firm that the investments existed down to 1886; and equity construes these representations as "a guarantee that the parties whose interest might be affected by the misrepresentation shall be placed in the same situation as if the facts represented were true" (p. 554). (Compare *Shaw* v. *Port Phillip & Co.* (13 Q. B. D. 103); *Swire* v. *Francis* (3 A. C. 106) and *London Freehold Co.* v. *Suffield* ([1897] 2 Ch. 608), and *post*, pp. 251, 252, where the principal facilitated the misrepresentations of his agents.) Consequently all three partners or their estates had to make these representations good, and the right of action accrued at the date of the last representation, namely in 1886. In *Thorne* v. *Heard* Lord Herschell's view was that S. ceased to be the agent for Heard with regard to the surplus at the moment at which

Heard paid the surplus to him in the erroneous belief that he was agent for somebody else. S. was not "acting within the scope of his authority" as agent, nor was he "doing something or purporting to do something on behalf of the principal" (p. 502), for the simple reason that the relationship had long since ceased. And there is this further limitation on the power of an agent to commit his principal by his fraud; the fraud must be committed in the interest of the principal. This was the case in *Blair* v. *Bromley* (*ubi supra*), where the retired partner had the benefit of the fraud. In *Barwick* v. *English Joint Stock B.* (L. R. 2 Exc. 259, 265) Willes, J., regarded these words, "for the master's benefit," as essential to the case. Lord Selborne, in *Houldsworth* v. *City of Glasgow B.* (5 A. C. 317, 326), cited Mr. Justice Willes's definition with approval; and *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (18 Q. B. D. 714) decided the very point. See *post*, pp. 366, 367.

Date of discovery of fraud.

But the argument of fraud was used for another purpose. Equity has engrafted on the *Statute of Limitations*, 1623, the principle that, where there is concealed fraud, the right of action accrues at the date of its discovery. Of course plaintiff must have kept his eyes wide open (but see *Betjemann* v. *B.* ([1895] 2 Ch. 474) as to co-partners), or else he cannot avail himself of this plea. Since the *J. Act*, 1873, every division of the High Court gives effect to this equitable principle: *Gibbs* v. *Guild* (9 Q. B. D. 59). This doctrine is incorporated into the *Real Property Limitations Act*, 1833, s. 26. It was urged then that the right of action accrued at the date of the discovery of the fraud (1892). It had been already decided that in the case of the Act of 1833, *Willis* v. *Howe* ([1893] 2 Ch. 545), citing *Lawrence* v. *Norreys* (15 A. C. 210), etc., and it was now decided that with regard to every action "if fraud or a non-discovery of fraud is to be relied on to take a case out of the Statute of Limitations it must be the fraud of, or in some way imputable to the person who invokes the aid of the Statute of Limitations:" per Lord Davey (p. 506). So that in answering the first argument about fraud in the negative the Court had already answered this second argument about fraud. This decision was followed in *In re McCallum* ([1901] 1 Ch. 143), where A. assigned property to B. (1884), B. (by concealed fraud) to C. (1886). A. remained in possession from 1884 or 1886 until his death in 1899. Then C., hearing of the deed of 1886 concealed by fraud, claimed the property. In vain; for A. and his heir were allowed to profit by a fraud not imputable to himself. Had A. claimed through C. the decision would have been otherwise: see cases cited in Rigby, L.J.'s, dissentient judgment.

As to trust property retained.

The word "still" retained means retained at the commencement of the action ([1894] 1 Ch. 606); and the trustee "retains" it "if he or any agent for him has it so that he can get it" (*ib.*). Kay, L.J., said: "While the money remained in S.'s hands without any change in the nature of his possession of it, his retention of it was a retention by the first mortgagees" (*ib.*, p. 609), and it was retained so long as it could be followed. On the other hand, Lord Davey's view was that retention by Heard ceased the moment that the money was paid to a person whom he erroneously believed to be the agent of another; constructive possession changed at that moment. But this question was insufficiently discussed.

In *Wassell* v. *Leggatt* ([1896] 1 Ch. 554) money was left before the *M. W. P. Act*, 1882, to a wife's separate use without the intervention of trustees. The husband was therefore implied trustee for her; but pocketed it. She recovered it from his executors nineteen years afterwards, on the ground that he was her trustee and had "retained" the trust money.

As to conversion.

But S. had converted it to his own use, and it seems from the judgment that conversion by S. put an end to constructive retention by Heard. It was just as though "these moneys before action brought had been stolen from Heard and the thief had remained unknown and the money unrecovered" ([1894] 1 Ch. 614). The conversion must be wrongful: *In re Gurney* ([1893] 1 Ch. 590).

Executor-trustees.

Executor-trustees retained property *in specie* until 1882, when the youngest *c.q.t.* attained twenty-one. This was a breach of trust. In 1890 the beneficiaries brought an action against the executor-trustees, alleging that the action was for a legacy, that the right of action accrued in 1882, and that the time-limit within which action must be brought was twelve years. Held that the limit was six years, as the case fell within sect. 8 (1) (*b*) of the *T. Act*, 1888, *In re Swain* ([1891] 3 Ch. 233); *secus* where there is no express trust, but a direction for maintenance which the executor must carry out, *In re Davis* ([1891] 3 Ch. 119), or where the property is left to executor-trustees upon trust "subject to the payment of legacies:" *In re Barker* ([1892] 2 Ch. 491). Compare *In re Page* ([1893] 1 Ch. 304). See *post*, p. 249.

Date of investment, date of right of action.

The date of the making of an improper investment is the date of the right of action where the plaintiffs are of age and in possession; and the payment of interest thereon is not an acknowledgment from which to date the right of action: *In re Somerset* ([1894] 1 Ch. 231). Compare *In re Bowden* (45 Ch. D. 444) for improper investment; *In re Chapman* ([1896] 2 Ch. 763) for improper retention of investments; and contrast *In re Tucker* ([1894] 1 Ch. 724 and 3 Ch. 429) and *Moore* v. *Knight* (*ubi supra*) as to the effect of paying interest. The rights as between co-trustees begin when one is made liable by a beneficiary: *Robinson* v. *Harkin* ([1896] 2 Ch. 415), following *Wolmershausen* v. *Gullick* (*post*, p. 292). As to trusts for accumulations see *How* v. *Winterton* (*supra*); for order see *In re Davies* ([1898] 2 Ch. 142).

Falling into possession of implied estate.

An estate by implication is a different estate to a preceding estate by actual gift, and time does not begin to run under sect. 8 (1) (*b*) of the *T. Act*, 1888, till the second estate falls into possession: *Mara* v. *Browne* ([1895] 2 Ch. 69).

Laches and

Interests not in possession will support an action to have trust funds secured, so that a man may lose by *lâches* what he has not lost under the Limitations Act: *In re Taylor* (81 L. T. 812). *Limitations Act.*

NOTE.

Other Statutory Protection to trustees is set forth *ante*, pp. 179, 180. Their equitable rights are set forth in the following chapters.

Trustees' Costs and Expenses.

STOTT *v.* MILNE.

(25 CH. D. 710.)

The costs and expenses of trustees properly incurred in the execution of a trust are a first charge on all the trust property, both income and corpus. The fact that counsel have advised trustees to bring an action is not conclusive that the action was properly brought. Principle.

Stott, who was beneficially entitled for life to a certain freehold estate of which Milne was trustee, brought an action against Milne for an account of the rents, and the question arose whether the cost of two actions which had been brought by Milne without Stott's authority, but under the advice of counsel, for the protection of the estate, ought to be allowed, and if so, whether Milne was entitled to retain them out of the income of the estate. The C. A. held that the actions were brought *bonâ fide* and were beneficial to the estate, and therefore the trustees were entitled to a charge upon the *corpus*, and to retain the income until provision could be made for raising the costs out of the *corpus*. Summary of facts.

The principle of these cases was thus stated by Lord Selborne in *Cotterell* v. *Stratton* (8 Ch. 295, 302), and cited in *Turner* v. *Hancock* (20 Ch. D. 303). "The contract between mortgagor and mortgagee Origin of the rule in contract.

makes the mortgage a security, not only for principal and interest and such ordinary charges and expenses as are usually provided for by the instrument creating the security, but also for the costs properly incident to a suit for foreclosure or redemption. In like manner the contract between the author of a trust and his trustees entitles the trustees, as between themselves and their *c.q.t.*, to receive out of the trust estate all their proper costs incident to the execution of the trust." See *post*, pp. 230, *et seq.*

Advice of counsel.

In the l.c. the C. A. reversed the Court of First Instance, first on the points that counsel's advice gave a right of indemnity to the trustees, secondly on the point that as the actions were brought without the authority of Stott the costs were not chargeable against the income.

"I cannot say," said Lord Selborne, "that because an action is advised by counsel it is always and necessarily one which trustees may properly bring. The advice of counsel is not an absolute indemnity to trustees in bringing an action, though it may go a long way towards it." Compare *In re Cull* (20 Eq. 561); *In re Beddoe* ([1893] 1 Ch. 547, 551, 562), *ante*, pp. 86, 177.

Charge on income as well as capital.

As to the second point, "The property," said Lord Selborne, "was peculiarly circumstanced," as it was "available for building purposes, and anything done by tenants or neighbours which would give any other persons rights over it, might cause a material depreciation in its value. The trustees had, therefore, an anxious duty to perform. Under these circumstances, we ought to be clearly satisfied that the actions were improper" before refusing costs out of the estate. "The right of trustees," said Lord Selborne, "to indemnity against all costs and expenses properly incurred by them in the execution of the trust is a first charge on all the trust property, both income and *corpus*. The trustees, therefore, had a right to retain the costs out of the income until provision could be made for raising them out of the *corpus*."

Trustee's right to indemnity for agent's tort.

In *Benett* v. *Wyndham* (4 D. F. & J. 259), a trustee rightfully directed the bailiff of the settled estate to fell certain trees. The bailiff's wood-cutters allowed a bough to fall on a passer-by, who recovered heavy damages against the trustee. The C. A. held that the trustee was entitled to indemnity out of the trust estate. Knight Bruce, L.J., said, "The trustee in this case appears to have meant well, to have acted with due diligence, and to have employed a proper agent to do an act, the directing which to be done was within the due discharge of his duty. The agent makes a mistake the consequences of which subject the trustee to legal liability to a third party. I am of opinion that this liability ought as between the trustee and the estate to be borne by the estate." In *In re Raybould* ([1900] 1 Ch. 199) the trustee's manager in carrying on testator's colliery, injured adjoining buildings. The injured party got judgment for £1000 against the trustee, and as the latter would have a lien for this amount against the settled estate, they were declared entitled thereto in subrogation to the trustee.

Other instances of expenses allowed,

The principle that, in the words of the *Trustee Act*, 1893, s. 24, a trustee "may reimburse himself or pay or discharge out of the trust premises all expenses incurred in or about the execution of his trusts or powers," which is illustrated above by costs of unsuccessful litigation and damages in tort, also includes travelling expenses, costs of employing a solicitor or barrister, *e.g.* to oppose a private Bill: Lewin on Trusts, 10th ed. pp. 750, *et seq.*; costs of defending a successful action brought to set aside *Merry* v. *Pownall* ([1898] 1 Ch. 306), or rectify a deed, *James* v. *Couchman* (29 Ch. D. 217); see p. 55; of defending a compromise made for the benefit of the estate, although the main question raised was his personal honesty, *Walters* v. *Woodbridge* (7 Ch. D. 504); of punishing the solicitor, *In re Davis* (57 L. T. 755); and it includes borrowings, if ratified, though outside the trust, *Balsh* v. *Hyham* (2 P. W. 453), unratified *ultra vires* payments if within the trust, *ex p. Chippendale* (4 D. M. & G. 19); payment of calls, *Todd* v. *Moorhouse* (19 Eq. 69); *Whittaker* v. *Kershaw* (45 Ch. D. 320); *Hardoon* v. *Belilios* ([1901] A. C. 118)*, citing *Castellan* v. *Hobson* (10 G. 47), *James* v. *May* (L. R. 6 H. L. 328), *Loring* v. *Davis* (32 Ch. D. 625) (constructive trustee); payment of insurance premiums, *In re Leslie* (23 Ch. D. 552), and *post*, p. 296; past payments for maintenance, *Brown* v. *Smith* (10 Ch. D. 377); employment of professional agents, see pp. 170, *et seq.*; liabilities in carrying on a business, *Dowse* v. *Gorton* ([1891] A. C. 190); *In re Brooke* ([1894] 2 Ch. 600); *In re Raybould* ([1900] 1 Ch. 199; *Jennings* v. *Mather* ([1901] 1 Q. B. 108), ([1901] W. N. 207); authorized or necessary improvements, *Woods* v. *Axton* ([1866] W. N. 207); *Rowley* v. *Ginnever* ([1897] 2 Ch. 503) (constructive trustee), but see *Vyse* v. *Foster*, *infra*; payment of debts barred by the *Statutes of Limitations*, *Budgett* v. *B.* ([1895] 1 Ch. 202); for this is one of those remedies which the Statutes do not bar; cf. *In re Margetts* ([1896] 2 Ch. 263) and *post*, p. 247. Probable future expenses of a similar kind will support an action to declare trustees entitled to indemnity: *Hobbs* v. *Wayet* (36 Ch. D. 256)†. The trustee ought to be in a position to pay these expenses by drawing in the first instance on the trust fund: *In re Blundell* (40 Ch. D. 376, 377)†. See *Wolmershausen* v. *Gullick* ([1893] 2 Ch. 514), *post*, p. 292 (21). See "testamentary expenses," *post*, p. 282.

or disallowed.

Mere trouble, Lewin, *supra*; costs of unnecessary litigation, *In re Beddoe* ([1893] 1 Ch. 547), or conduct of litigation, *Hosegood* v. *Pedler* (66 L. J. Q. B. 18); speculative investments, *Eccl. Com.* v. *Pinney* ([1900] 2 Ch. 736); unauthorized improvements which cause loss, *Vyse* v. *Foster* (8 Ch. 309; 7 H. L. 318); *Collinson* v. *Lister* (20 B. 356); improper abortive sale, *Leedham* v. *Chawner* (4 K. & J. 458); a payment of 5 per cent. commission to a solicitor to collect rents, *In re Weall* (42 Ch. D. 674), and a similar payment to a proper rent-collector where they themselves were remunerated for this service, was disapproved: *Cox* v. *Bennett* (39 W. R. 308); and therefore there was no lien. Nor is there a lien where a trustee is condemned in costs under Order LXV. r. 1 (see below, Note).

Analogous cases.

A tenant for life, exercising his power under the *S. L. Act*, 1882, is entitled to similar costs, charges, and expenses, and to a similar lien therefore on the settled estate: *In re Llewellin* (37 Ch. D. 317); *In re Smith's S. E.* (64 L. T. 821). Lord Cottenham in *A.-G.* v. *Norwich* (*Mayor of*) (2 My. & C. 406, 424) (compare *A.-G.* v. *Pearson* (2 Coll. 581) (tort); *Bridge* v. *North* (2 Ph. 216) (opposing bill)); and Jessel, M.R., in *A.-G.* v. *Brecon* (*Mayor of*) (10 Ch. D. 204) (cited in *A.-G.* v. *Swansea Corp.* ([1898] 1 Ch. 602); *Leith Council* v. *Leith Harbour Com.* ([1899] A. C. 508)), compared this right of trustees to indemnity to the right of public bodies to spend public funds reasonably and within the scope of their authority. Irremovable salaried receivers of the trust estate appointed by testator are really trustees: *Consett* v. *Bell* (1 Y. & C. C.C. 569); *Hibbert* v. *H.* (3 Mer. 681); compare *Williams* v. *Corbet* (8 Si. 349); contrast *Foster* v. *Elsley* (19 Ch. D. 518), and therefore come within this rule. They are not agents.

Extent and nature of the lien.

The lien is inapplicable to property other than property of which the person who makes the payment is trustee: *In re Earl of Winchilsea's Policy T.* (39 Ch. D. 168). And it does not even apply to all that property; for "it does not extend so far as to enable them to apply all funds, part of the property which they took in trust, and of which they are not divested, in relief of expenses incurred on behalf of a separate branch of the trust:" *per* Lord Blackburn in *Fraser* v. *Murdoch* (6 A. C. 855, 873). For cases of void deeds, *ante*, p. 55. In the case of liabilities incurred in carrying on a testator's business the lien applies to assets of the testator at and subsequent to his death: *Dowse* v. *Gorton* (*ubi supra*)*. This right is assignable, and passes to the trustee's trustee in bankruptcy: *Jennings* v. *Mather* ([1901] 1 Q. B. 108), ([1901] W. N. 207).

Subrogation.

The lien applies also in favour of third parties if third parties have made any of these payments at the request of the trustee, *e.g.* to save part of the estate: *Hamilton* v. *Tighe* ([1898] 1 Ir. R. 123) (miscalled salvage), or to pay a mortgage, *Patten* v. *Bond* (60 L. T. 583), followed in *Chetwynd* v. *Allen* ([1899] 1 Ch. 353). In *Burridge* v. *Row* (1 Y. & C. C. C. 583) premiums paid by beneficiaries at trustee's request were charged on the estate; others were not charged. Subrogation, as this right is called, was allowed in *In re Pumphrey* (22 Ch. D. 255); *Todd* v. *Moorhouse* (*ubi supra*). In the latter case the payer was also beneficiary, and the trustees also had other trust funds which they might have applied in the manner suggested; the beneficiary, in spite of this, was entitled to the lien. A person with a claim on the trustees *quâ* trustees has the same lien on the trust estate as the trustees would have if they paid his claim: *In re Blundell* (44 Ch. D. 1); *In re Raybould*, *supra*. But "the creditor cannot have anything higher than a right to be substituted to the right of the 'trustee' to indemnity," *In re Evans* (34 Ch. D. 597, 601); therefore his right is valueless if the trustee to whom he is substituted is in default or a debtor to the estate, *ex p. Harper* (20 Ch. D. 685); *ex p. Lloyd George* ([1898] 1 Q. B. 520); *In re Johnson* (15 Ch. D. 548), or incurred these expenses improperly: *Strickland* v. *Symons* (22 Ch. D. 666; 26 Ch. D. 245); *Eccl. Com.* v. *Pinner, supra;* and it is only valid against the property of which the trustee is trustee, per Jessel, M.R., *In re Johnson* (p. 553), citing Lord Eldon and Turner, L.J.; and per Lord Selborne in *Strickland* v. *Symons.* This last point seems a truism, but it occasions difficulty in cases where executors metamorphose themselves into trustees on the principle of *Dix* v. *Burford*, cited p. 219. In such cases testator's creditors should take proceedings before the metamorphosis is effected; otherwise they will find themselves postponed to creditors of the trustee-executors as in *Dowse* v. *Gorton*, *In re Brooke, supra.*

Priority.

In all these cases the trustees' costs and expenses come first out of the fund in question. In *Morison* v. *M.* (7 D. M. & G. 214) a receiver's costs were preferred to the costs of the suit. In *In re Price* (31 Ch. D. 485), there were two actions, and as a rule the costs of the second (an administration) action take precedence of those of the first (a probate) action. But in spite of that rule, the executor's costs and expenses in both actions took precedence of all other costs incurred. In *In re Jones* ([1897] 2 Ch. 190) his costs of the probate action were preferred to an assignment during and after it. In *Dodds* v. *Tuke* (25 Ch. D. 617), a case arising on a creditor's deed, the costs and expenses of trustees were preferred to the debts of creditors. In *Dowse* v. *Gorton* and *In re Brooke* creditors, in *In re Morgan* (18 Ch. D. 93), equitable mortgagees, in *In re Exhall Coal Co.* (35 B. 449), debenture holders were again postponed to trustees. So in *In re Evans*, *In re Johnson, supra.* See *post*, pp. 216, 217. But in these cases the creditors knew that the business was being carried on by the trustees for their benefit, and did not object. In *In re Brooke*, Kekewich, J., inferred this knowledge from the fact that the creditor who claimed precedence had notice of it as mortgagee. The subsequent carrying on of the business by a receiver in an administration action did not alter the relations of the parties.

NOTE.—*Costs of Trustees and Mortgagees.*

R. S. C., 1883, as to costs.

Order LXV. r. 1, R. S. C., 1883, provides that nothing therein contained "shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division." Subject to this, the costs are in the discretion of the Court. And compare *Supreme Court of Judicature Act*, 1890, s. 5.

The costs given to trustees are as between solicitor and client. See *Mortgage, etc., Corp.* v. *Canadian, etc., Co.* ([1901] 2 Ch. 377) for trustees for debenture-holders. See *In re Love* (29 Ch. D. 348; *In re Maddock* ([1899] 2 Ch. 588), where two sets of costs and costs of two counsel were awarded. Trustees may sever in their defence if there is a charge of fraud: *Walters* v. *Woodbridge* (7 Ch. D. 504); *Williams* v. *Wight* ([1890] W. N. 50) (exor. of dead trustee). If no such charge is made they must explain why they severed: *In re Isaac* ([1897] 1 Ch. 251). Trustees will have to pay costs of action due to their misconduct: *In re Cabburn* (46 L. T. 848). See *In re Cull* (20 Eq. 561), and *post*, pp. 325 *et seq.* (bringing administration action); *In re Weall* (42 Ch. D. 674); *Easton* v. *Landor* (67 L. T. 833) (breach of trust); *Budgett* v. *B.* ([1895] 1 Ch. 202) (unnecessary expenses); *In re Knox's T.* ([1895] 2 Ch. 483); *In re Chapman* (72 L. T. 66) (delay, etc.), (refusal to account); *In re Bell's E.* (39 L. T. 422); *In re Hayter* (32 W. R. 26); but not for errors, *In re Chennell* (8 Ch. D. 492); *Turner* v. *Hancock* (20 Ch. D. 303); *In re Jones* ([1897] 2 Ch. 190). Compare *In re Watts, Bird* v. *Wenn* (mortgages), cited *post*, p. 231. In *In re S. Knight's Will* (26 Ch. D. 90) costs were both allowed and disallowed. And *Stott* v. *Milne* and *Benett* v. *Wyndham* (*ubi supra*) were cases of error of judgment. In *In re Hodgkinson* ([1895] 2 Ch. 190) the trustees were disentitled to retain costs, because the judge made no order as to costs. Costs in another action are expenses, and thereupon an order about them is appealable: *In re Beddoe* ([1893] 1 Ch. 547). An order as to costs, charges, and expenses is not appealable if right as to charges and expenses: *Bew* v. *B.* ([1899] 2 Ch. 467)†, *post*, p. 232. Trustees will not get their costs in an unsuccessful appeal as of course: *Ex parte Russell* (19 Ch. D. 588), but see *In re Holden* (20 Q. B. D. 43); *James* v. *Couchman* (29 Ch. D. 217).

Right of Retainer by Executor or Administrator.

In re ROWNSON: FIELD *v.* WHITE.

(29 Ch. D. 358.)

Principle.

An executor or administrator cannot retain a debt in respect of which, if vested in another person, no action could be maintained.

Summary of facts.

An administratrix claimed to retain £500 and interest on the ground that her father, who had died intestate, had made a verbal promise to her husband in consideration of her marriage to give her £500 as her portion, and that he had never fulfilled his promise.

The C. A. decided that the administratrix had no right of retainer.

Reason of the rule.

In this case an attempt was made to extend the doctrine of Retainer. The rule is thus laid down in Williams on Executors (9th ed. p. 884): "As an executor or administrator, among creditors of equal degree, may pay one in preference to another, so it is another of his privileges that he has a right to retain for his own debt due to him from the deceased in preference to all other creditors of equal degree. This remedy arises from the mere operation of law on the ground that it was absurd and incongruous that he should sue himself, or that the same hand should at once pay and receive the same debt."

Exception as to *Statute of Limitations.*

The general rule is, that it is a *devastavit* if an executor or an administrator pay that which need not be paid. But "since the time, at all events, of Lord Hardwicke it has been said, with a passing dissent on the part of an eminent common law judge in *McCulloch* v. *Dawes* (9 D. & R. 40, 43), and now it is established law both in Courts of Equity and Law, that no executor is compelled to take advantage of the *Statute of Limitations* against debts otherwise justly owing." An executor may pay a statute-barred debt if he thinks fit; unless the residuary legatee on summons objects, *In re Wenham* ([1892] 3 Ch. 59), or unless the Court has held that the debt is barred, *Midgely* v. *M.* ([1893] 3 Ch. 282), or (possibly) unless the co-executor objects (*ib.*). And he may also retain such debt, *Hill* v. *Walker* (4 K. & J. 166).

However, "There is," said Bowen, L.J., "this difference also between a case under the *Statute of Limitations* and a case under the 4th section of the *Statute of Frauds.* The *Statute of Limitations* does not destroy the debt, but only the remedy, and it has been held that an executor may waive that defence in the case of a debt which existed and which appears to be well founded. But a parol contract within the *Statute of Frauds*, though not void to all intents and purposes, but capable of being dealt with for certain purposes as a valid agreement, is incapable nevertheless of being enforced in an action either directly or indirectly. And if you have a contract which is not capable of being enforced either at law or in equity, I fail to see that a contract of that sort creates a debt or liability against the estate of a testator." The Court accordingly held that the anomaly as to payment or retainer of debts barred by the *Statute of Limitations*, was not to be extended to a case where the *Statute of Frauds* prevented the enforcement of the debt.

Origin of this right

The right of retainer arises from possession, not from abstract justice. It illustrates the maxim, "*Beati porsidentes.*" Hence Malins' from possession.

"It is a relic of old law not founded on justice, and working the greatest possible injustice," *Crowder* v. *Stewart* (16 Ch. D. 368); and Lord Keeper Wright's "The right of retainer, as it produces inequality, is never assisted:" *Hopton* v. *Dryden* (Pre. Ch. 179).

Nature of this right as conferring priority, but not over specialty debts,

The right to retain is a right to prefer, and confers priority on testator's bankruptcy. It does not confer priority over debts of a superior degree, *e.g.* specialty debts despite *Hinde Palmer's Act* (32 & 33 Vict. c. 46), which abolishes the distinction between simple and specialty debts: *Wilson* v. *Coxwell* (23 Ch. D. 764); *In re Jones* (31 Ch. D. 440); *In re Briggs* (W. N. 1894, 162). Let assets equal £100. Then, if (1) specialty debts equal £50; (2) simple debts to executor equal £25; (3) other debts equal £125; the order runs thus: (1) get £25; (2) £25; (3) £50. But if (1) equal or exceed £100, the assets are divided equally and there is no retainer: *Talbot* v. *Frere* (9 Ch. D. 568). The same order is applicable if (2) comprise death duties or other Crown debts which, like retainer, are unaffected by *Hinde Palmer's Act: In re Bentinck* ([1897] 1 Ch. 673). Similarly an executor's right to prefer other creditors is unaffected by *Hinde* v. *Palmer's Act; In re Hankey* ([1899] 1 Ch. 541).

nor judgment debts.

"Debts of a superior degree" include judgment debts: *In re Williams' E.* (15 Eq. 270); *In re Stubbs' E.* (8 Ch. D. 154). "Balance Orders" or "Calls" under the Companies Acts, 1862, Rules 33–35, are not judgment, *In re Hubback* (29 Ch. D. 934), nor indeed are they any other sort of debt: *In re Auriferous Properties* ([1898] 1 Ch. 691). Poor Law Guardians' claims under the *Poor Law Amendment Act*, 1849, sect. 16, are not judgment debts, *Laver* v. *Botham* ([1895] 1 Q. B. 59), but for every purpose simple contract debts: *In re Watson* ([1899] 1 Ch. 72); *In re Taylor* ([1901] 1 Ch. 480).

Relief against mistaken priorities.

Executors who retain debts without notice of other debts of a superior degree do not commit *devastavit*, nor can they be made to refund: *In re Fludyer* ([1898] 2 Ch. 562), distinguishing *Blake* v. *Gale* (32 Ch. D. 571).

These priorities have not been affected by Judicature Act.

Similarly sect. 10 of the *Judicature Act*, 1875, which makes the rights of secured and unsecured creditors, and the rules as to debts proveable in the administration of the estates of deceased insolvent persons the same as in bankruptcy (see *In re Whitaker* ([1901] 1 Ch. 9), does not apply to retainer by an executor. "The Legislature never intended to treat an executor having a right of retainer as a secured creditor; if his right to retain was in the nature of a security he would have it as against creditors of a higher degree:" per James, L.J., in *Lee* v. *Nuttall* (12 Ch. D. 61); *In re May* (45 Ch. D. 499).

Under sect. 125 of the *Bankruptcy Act*, 1883, such estates may be administered in bankruptcy: *Hasluck* v. *Clark* ([1899] 1 Q. B. 699).

What debts are allowed.

Debts retained include damages for breach of contract for which there is a certain standard, *In re Compton* (30 Ch. D. 15), following *Loane* v. *Casey* (2 W. Bl. 965); debts of a copartner before accounts were taken, *In re Morris' E.* (10 Ch. 68); arrears, only, of an annuity, *In re Beeman* ([1896] 1 Ch. 48); a suretyship debt before payment by the surety, *In re Giles* ([1896] 1 Ch. 956), citing *In re Harrison* (32 Ch. D. 395); *In re Orme* (50 L. T. 51); loans by wife to husband for trade, *In re May* (45 Ch. D. 499); funeral expenses of wife, *In re McMynn* (33 Ch. D. 575). They do not include future payments of an annuity, *In re Beeman*, nor debts bequeathed by testator's creditor to his executor, *Jones* v. *Evans* (2 Ch. D. 420).

Who can claim them.

An executor may retain a debt due to him as trustee, *Sander* v. *Heathfield* (19 Eq. 21); *In re Wells* (45 Ch. D. 569); *In re Faithfull* (57 L. T. 14), or co-trustee, *In re Hubback* (29 Ch. D. 934); as joint creditor, *Crowder* v. *Stewart* (16 Ch. D. 368); *Talbot* v. *Frere* (9 Ch. D. 568, 575), as *c.q.t.* of the whole, but not of a partial interest in the debt, *In re Hayward* ([1901] 1 Ch. 221), citing *In re Dunning* (54 L. J. (Ch.) 900). The first three of these cases show that *c.q.t.* may compel their trustee to exercise his rights. In *In re Richards* ([1901] 2 Ch. 399) a manager of a bank tried to retain a debt due to the bank without success.

Against what assets.

An executor's right of retainer extends to unrealized personalty if it exceeds the debt, *In re Gilbert* ([1898] 1 Q. B. 282), not to realty, *Walters* v. *W.* (18 Ch. D. 182), although he is trustee thereof, *Bain* v. *Sadler* (12 Eq. 570) (as he is under the *Land Transfer Act*, 1897); but such assets must come into his personal possession actually or constructively, *Pulman* v. *Meadows* ([1901] Ch. 233), whether before or after a decree for administration, *Davies* v. *Parry* ([1899] 1 Ch. 602); and the right must be claimed by him during his life, otherwise his representatives cannot exercise it on his behalf: *In re Compton* (30 Ch. D. 15), citing *Wilson* v. *Coxwell* (23 Ch. D. 764). For this right is possessory only.

Loss of this right by loss of possession, not by payment into Court, but by appointment of receiver

This right arises from possession, and is therefore lost by loss of possession, *e.g.* by appropriation or the appointment of a receiver.

Though not lost by payment into Court, it is lost as to assets afterwards got in, by the appointment of a receiver, *In re Jones* (31 Ch. D. 440) (order), following *In re Birt* (22 Ch. D. 604), the difference being "that when the assets are paid into Court, there being no receiver, that is done with the assent of the executor, and it is the same for this purpose as if they had passed through his hands; but when a receiver is appointed a debtor to the estate may pay his money direct to the receiver and obtain a good discharge, so that the appointment of a receiver prevents the money, actually or theoretically, coming to the executor's hands, and without possession there can be no retainer:" per Kay, J., in *In re Jones*. Although an order under sect. 125 of the *Bankruptcy Act*, 1883 (*ante*, p. 214), vests the estate in the Official Receiver, yet executor's right of retainer remains: *In re Rhoades* ([1899] 2 Q. B. 347). The Court will not appoint a receiver in order to extinguish, *In re Wells* (45 Ch. D. 569), any more than it will order payment out in order to confer this right: *Trevor* v. *Hutchins* ([1896] 1 Ch. 844).

and by waiver.

This right is lost by waiver. The executor does not lose it "because he had done nothing to assert it before there was any occasion to do so." The first occasion is "when some one seeks to take assets out of his possession:" per Lindley, M.R., in *In re Rhoades* ([1899] 2 Q. B. 347). It is not lost by payment into Court by or in the presence of the executor, *Richmond* v. *White* (12 Ch. D. 361), by his commencing an administration action as creditor and submitting to account in the usual way, *Ex p. Campbell* (16 Ch. D. 198); *Davies* v. *Parry* ([1899] 1 Ch. 602), by an order for an account made against him under O. xv. r. 1, *In re Barrett* (43 Ch. D. 70), by the chief clerk's certificate, *In re Giles* ([1896] 1 Ch. 956), distinguishing *Player* v. *Foxhall* (1 Russ. 538), nor by payment of assets collected by him before a receiver was appointed to a receiver, *In re Harrison* (32 Ch. D. 395): compare *In re Lance* (W. N. 1900, 29), nor by payment under error, nor by proof for his debt under error and then withdrawal of proof: *In re Rhoades* ([1899] 2 Q. B. 347), *ante*, p. 95 (23). Otherwise proof operates as a waiver: *Player* v. *Foxhall* (1 Russ. 538). Compare p. 219 (25).

Retainer by others than executors.

Administrators enjoy this right equally with executors despite the present form of their bond: *Davies* v. *Parry* ([1899] 1 Ch. 602); *In re Belham* ([1901] 2 Ch. D. 52). So an heir or devisee may retain specialty debts in which the heir is bound, for the same reason as an executor may retain any debts, and the decisions on *Hinde Palmer's Acts* apply equally in both cases, *In re Illidge* (27 Ch. D. 478); but he may retain no other debts: *ib.*, citing *Ferguson* v. *Gibson* (14 Eq. 379). Devisees, who are trustees for sale for payment of debts, have no right of retainer, *Bain* v. *Sadler* (12 Eq. 570), much less have other trustees, constructive trustees, and mortgagees of land: *Talbot* v. *Frere* (9 Ch. D. 568).

TRUSTEES' AND EXECUTORS' RIGHT TO IMPOUND.

Principle stated.

The right to impound a legatee's or *c.q.t.*'s interest under a will or settlement—sometimes miscalled "retainer"—is common to executors and trustees. It is also derived from possession, and only exists so long as assets of the legatee or *c.q.t.* remain in the executor's or trustee's possession. It is exercised in order to make good any debt to testator or his estate, and (in trust cases) breach of trust or contract arising under the settlement. Assigns including assigns in bankruptcy of a legacy or equitable interest take subject to this right to impound; for "the share of a legatee consists of what remains after all equities between him and the estate have been settled," per Romilly, M.R., in *Willes* v. *Greenhill* (*infra*), and "assignees of a bankrupt are subjected to all the equity by which the bankrupt himself would have been affected:" per Erskine, C.J., in *Ex p. Turpin* (*infra*). So are assignees of an assignee in bankruptcy: *Ex p. King* (2 M. & A. 410); *In re Hope* ([1900] W. N. 76). Similarly at common law a debtor is always "allowed to set up against the claims of an assignee of a debt claims of his against the assignor under the contract out of which the debt arose, and that even though the claim so sought to be set up had not ripened into a debt at the time of the assignment:" Williams' Bankruptcy (ed. 1898), p. 145, citing *Mangles* v. *Dixon* (3 H. L. C. 702); *Jeffreys* v. *Agra B.*, 2 Eq. 674, 680. So here the assignees of a *c.q.t.* are assignees of an equitable chose in action, and the trustee when they sue him can set up obligations under the contract which afterwards matured into a charge.

In the following illustrations A. B. = executors, B. C. = trustees, A. B. C. = executor trustees, D. and E. = tenants for life, F. and G. = remaindermen, K. = trustee or receiver for creditors, L. = trustee in bankruptcy, M. = assign without notice, N. = assign with notice, S. = settlor, T. = testator, *o.* = annuity, *p.* = money legacy, etc., *w.* = share of residue, *v.* = leaseholds, *x.* = freeholds.

Kinds of debt allowed.

The following cases in which the right was conceded and the assign (who is M., unless otherwise stated) postponed illustrate the kind of debts:—

(1) T. leaves *p.* to C., who attacks T.'s will, and then assigns *p.* to M. Then costs are given against C. These costs are deducted from *p.*: *Hopkins* v. *Gowan* (1 Moll. 561).

(2) Ditto, if C. be F., and A. B. residuary legatees: *In re Knapman* (18 Ch. D. 300).

(3) A. B. C. pay *p.* to C., which C. covenants to repay if T.'s personalty shall prove insufficient. Then C. mortgages *w.* to M. T.'s personalty proves insufficient, *p.* is deducted from *w. In re Moore* (45 L. T. 466).

(4) S. gives *o.* to B. C. on trust for D., then F.; D. covenanting to pay B. C. £1000 p.a. in 1784–86 to be held in trust for S. for life, then F. In 1783 D. is bankrupt, *o.* is impounded to make good the £3000, and L. is postponed: *Ex parte Mitford* (1 B. C. C. 398; 9 Ves. 89, 96, 114; 3 Mer. 105).

(5) S. gives *o.* to B. C. on trust for D., then, etc., D. covenanting to pay B. C. £4000 in 1799 to be held on the same trusts. In 1802 and 1806 D. assigns *o.* to M. In 1810 D. absconds. B. C. impounds *o.* to make good the £4000: *Priddy* v. *Rose* (3 Mer. 86); *Kilworth* v. *Mountcashell* (15 Ir. Ch. R. 565).

(6) "What was the original equity of the trustees? Not to stop the dividends merely at the first moment the debt became due, but whensoever they might think the interests of the trust required that step to be taken:" per Sir W. Grant (*Priddy* v. *Rose* at p. 107). This principle would apply to unpaid suretyship liabilities, per North, J., in *In re Binns* ([1896] 2 Ch. 384).

(7) S. gives *p.* and *w.* to B. C. on trust for D., then F. D. spends *p.*, and dies. F. sues B. C., who refund *p.* with costs, and retain these payments and costs out of D.'s life interest in *w.* in priority to K.: *Williams* v. *Allen* (32 B. 650).

(8) S. gives *p.* and half *x.* to B. C. on trust for D., then F. B. C. allow D. to spend *p.* in buying half *x.* This is a breach of trust.

B. C. impound D.'s life interest: *McGachan* v. *Dew* (15 B. 84). Distinguish *Lincoln* v. *Wright* (4 B. 432).

(9) Statute barred debts, etc., as in retainer: *Dingle* v. *Coppen* ([1899] 1 Ch. 726); *In re Akerman* ([1891] 3 Ch. 212). Suretyship debts are discussed (6), (13), (14), (26), (27).

On the other hand, (10) debts from a bankrupt made bankrupt in testator's life, *In re Hodgson* (9 Ch. D. 673), *In re Orpen* (16 Ch. D. 202), or discharged before his interest was impounded, per North, J., in *In re Watson;* (11) debts arising *dehors* the settlement and not being debts to a testator, *Stephen* v. *Venables* (30 B. 625); (12) debts extinguished by *R. P. L. Act*, 1874, *In re Jolly* ([1900] 2 Ch. 616), are not included.

Interest.

(13) T., surety for F.'s mortgage debt at 5 per cent., leaves *w.* to B. C. on trust for A. for life, then F. and G. (1857). A. becomes bankrupt (1859); A. B. C. never prove. A. B. C. pay £122 as such surety; A. and G. £40. F.'s mortgagees sell *w.*, repay themselves (£578), and pay balance to A. B. C. (1869), which balance on A.'s death (1894) = £1157, which B. C. impound in order to recover the £122 and £578 with interest at 4 per cent. L. is postponed: *In re Watson* ([1896] 1 Ch. 925), citing *In re Batchelor* (16 Eq. 481, *In re Whitehouse* (37 Ch. D. 683).

(14) T., surety for C.'s note, leaves *w.* to C. after D.'s death. C. mortgages *w.* to B. Then C.'s note falls due, and A. B. C. pay £3000 principal, £463 interest, and costs; and C. mortgages *w.* to A. B. C. to secure this. Then B. assigns his mortgage to M. Then D. dies. The mortgages rank in order of date. A. B. C. deduct £3463 and interest on £3000 out of *w.*: *Willes* v. *Greenhill* (29 B. 376).

(15) A. B. C. lose £3000 by breach of trust; A. B. replace it. They impound C.'s life interest to recover £1000 and costs without interest. L. is postponed: *Prime* v. *Savell* ([1867] W. N. 227).

Against what assets.

(16) Profits of a business left to A. B. C. upon trust to carry it on and pay profits to debtor: *In re Taylor* ([1894] 1 Ch. 671; *secus* specific chattels (*ib.*)).

(17) Converted realty: *In re Moore, supra.*

(18) Residuary personalty and realty upon trust to convert, but not specific freeholds and leaseholds: *In re Akerman* ([1891] 3 Ch. 212).

(19) A legal rent charge included in the consideration for the settlement. Here a receiver was appointed: *Woodyatt* v. *Gresley* (8 Sim. 180); *secus* a legal devise in the same will, *Fox* v. *Buckley* (3 Ch. D. 508).

(20) Proceeds of proof in bankruptcy, *Ex p. Turpin* (D. & C. 120); *Ex p. Maister* (Mont. 452); of sale of bankrupt's mortgages, *Smith* v. *S.* (1 Y. & C. 338). *Query* as to life estate repurchased from trustee in bankruptcy: *Vaughton* v. *Noble* (30 B. 34).

(21) Arrears of rent due before but received after the breach of covenant. L. is postponed: *Corr* v. *Corr* (3 L. R. Ir. 435). Compare (1) and (4).

(22) Interests under a completed voluntary settlement, *In re*

Weston ([1900] 2 Ch. 164), but not an interest merely maintained and not created by the settlement, *Hallett* v. *H.* (13 Ch. D. 232), nor if instead of an interest there is only a debt. Mutual debts are governed by set-off, which is distinct; *Dingle* v. *Coppen* ([1899] 1 Ch. 726).

(23) Assets coming to the defaulter as next of kin of a *c.q.t.*: *Jacubs* v. *Rylance* (17 Eq. 342).

Loss of right.

This right being derived from possession is lost by loss of possession, *e.g.* by appropriation by an executor. An executor who appropriates a legacy becomes until payment trustee thereof: *Dix* v. *Burford* (19 B. 409).

(24) But if A. who appropriates is defaulter his appropriation does not count: *Morris* v. *Livie* (1 Y. & C. C. C. 380); *Cole* v. *Muddle* (10 Ha. 186).

An executor may also waive or release his right (25), *e.g.* by proof in bankruptcy: *Stammers* v. *Elliott* (3 Ch. 195); *Armstrong* v. *Armstrong* (12 Eq. 614); *In re Watson* (at p. 933).

(26) T. leaves *w.* to A. B. C. upon trust for D., etc., for whom he was surety. A. B. C. pay £1000 on account of this debt to the creditor, who has released D. under a creditors' trust deed. If A. B. C. adopt the creditor's security, they are bound by this release: *In re Whitehouse* (37 Ch. D. 683).

(27) Before payment A. B. C. may not impound D.'s share as against the creditor: *In re Binns* ([1896] 2 Ch. 584).

(28) A trustee cannot waive or release this right. Nor can he lose it by *lâches* to his *c.q.t.*, *Priddy* v. *Rose* (3 Mer. 86), (29) by estoppel by deed, *Fuller* v. *Knight* (6 B. 205), (30) nor by appropriation by the Court, *Smith* v. *S.* (*ubi supra*), unless such appropriation is a *res judicata* binding him: *In re Eyton* (45 Ch. D. 458).

Costs of Solicitor-Trustee.

In re **CORSELLIS: LAWTON** *v.* **ELWES.**

(34 Ch. D. 675.)

Principle.

As a general rule a solicitor-trustee is not, nor is his firm entitled, in the absence of express authorization, to make any profits out of business relating to the trust.

Where, however, business is done in any action, or other legal proceeding on behalf of himself and his co-trustee, the solicitor or his firm may receive the usual charges if there has been no greater cost than would have been incurred if the solicitor or his firm had acted for the co-trustee alone.

Summary of facts.

A solicitor, who was co-trustee under a will which contained no power to charge for professional services, claimed against the trust estate:—

(1) Fees received by his partner for manorial business in respect of a manor belonging to the true estate to which the partner had been appointed steward by the co-trustees. These fees had been brought into the partnership account.

Profit costs (2) in respect of an application for the maintenance of an infant on a summons by next friend, in which he and his co-trustee were respondents, and in which his firm had acted through their London agents as solicitors for the respondents.

(3) In respect of business done by the same London agents for a receiver appointed in an administration action, commenced after the death of the co-trustee.

(4) Paid by the lessees for the preparation by the

solicitor-trustee's firm of leases which he had granted as trustee of the estate.

Only the first and second claims were allowed by the Court of Appeal.

Trustee may not profit by his office.

The principle is well established, *e.g.* by *Robinson* v. *Pett* (3 P. W. 251) and *Docker* v. *Somes* (2 M. & K. 655, 664–65), that a trustee shall not make a profit of his office, and accordingly in the absence of any special authority trustees or executors who are factors, brokers, commission agents, auctioneers, or bankers cannot derive any profit in the way of business from the estate committed to their charge (Lewin, 10th ed., pp. 296–308). It follows that a solicitor, whether express or constructive trustee, or executor or administrator, *Pollard* v. *Doyle* (1 Dr. & Sm. 319), cannot charge for his professional labours, is allowed nothing for his time or trouble, and loses his lien (*post*, p. 224), but will be allowed merely his costs out of pocket, unless there be a special contract or direction to that effect: *In re Barber* (34 Ch. D. 77, 81), and l.c. (34 Ch. D. 681). The reason of this rule is that equity will not allow a man to place himself in a position in which his interest and duty are in conflict. If it were not the rule, a trust estate might be heavily burdened by reason of business being done by a trustee or executor employing himself on behalf of the estate. The chief exception to this rule occurred where one of the trustees who was a solicitor "acted first for himself, secondly for a co-defendant who was a trustee, and thirdly for the *c.q.t.*:" *In re Barber* (*ubi supra*), citing *Cradock* v. *Piper* (1 M. & G. 664); so that he was entitled to receive full costs, such costs not having been increased through his conduct.

Cradock v. *Piper.*

Customary fees.

The "customary manorial fees" of which the first item consisted, were non-professional charges, not chargeable on the estate, and not arising from a duty which the trustee ought to have discharged gratuitously.

Summons for maintenance.

On the second point, Cotton, L.J., said: "It is said that the exception established by *Cradock* v. *Piper* would only apply to costs in a hostile action, and that this was not an action at all, but only a summons; . . . . but in my opinion it would be frittering away the decision, which we ought not to overrule, by saying that it only applies to a hostile action, no such limitation being laid down by Lord Cottenham."

Receiver's accounts.

The third item was disallowed because "The receiver and the trustee's firm acting for him were in a position not hostile but adverse to the interest of the estate." The two positions were inconsistent. It was the duty of the trustee to get all he could from the receiver. It was the interest of the receiver to charge all he could for the estate.

Costs of preparing leases.

The fourth item was disallowed upon the principle that although the costs were paid by the tenants in the ordinary course, the business was done on the employment of the landlord. It often happens that V. employs and P. pays a solicitor: *Dixon* v. *Winch* ([1900] 1 Ch. 742). The solicitor is paid out of the proceeds of the transaction. *Whitney* v. *Smith* (4 Ch. 513), where a solicitor-trustee-mortgagee was allowed to retain all professional charges paid by the mortgagor, was distinguished on the ground that there the solicitor was not acting adversely to the trust estate. But the distinction between mortgages and leases is unintelligibly reported (l.c., pp. 684, 685). *In re Gray* ([1901] 1 Ch. 239) discusses the costs which lessees usually pay, *e.g.* correspondence, counsel's fees, valuations, in certain cases, but not counterparts.

Disability of partners and agents.

The disability of the solicitor extends to his firm and to his partners: l.c., *Collins* v. *Carey* (2 Beav. 128); *Lincoln* v. *Windsor* (9 Ha. 158): *Lyon* v. *Baker* (5 D. & S. 622); *In re Univ. Priv. Tel. Co.* (23 L. T. 884) (liquidator's partner). And where a country firm (a member of which is trustee) employs London agents, and under the usual arrangements receives profit costs, it must account for such costs to the trust estate; but the London agents can receive their proportion of costs: *Burge* v. *Brutton* (2 Ha. 373): *Vipont* v. *Butler* ([1893] W. N. 64). But where one member of a firm of solicitors, who was a trustee, employs his partner to act as his solicitor in the trust business, under an agreement that the trustee should not participate in any way in the profits, the partner is entitled to his full costs: *Clack* v. *Carlon* (7 Jur. N. S. 441). The rule in *Cradock* v. *Piper* does not apply in favour of an ex-solicitor taking commissions from the solicitor on the record, *Vipont* v. *Butler*, nor where there is no co-trustee, or the co-trustee is against him: *Lyon* v. *Baker*.

Express authorization.

Express authority may be given to a solicitor-trustee to charge for his services. But the agreement should be carefully framed. Thus a power to charge for costs and expenses only includes expenses out of pocket: *Bainbrigge* v. *Blair* (8 B. 588); *Moore* v. *Frowd* (3 My. & Cr. 45). A power to make professional charges does not include charges for attendance: *Harbin* v. *Darby* (28 B. 325). A power "to make the same professional charges, and to receive the same pecuniary emoluments and remuneration for all business done by him, as if he not being trustee, was employed by the trustee," does not include non-professional charges: *In re Chapple* (27 Ch. D. 584).

Nor does a power to charge "all usual professional or other charges for business done, whether in the ordinary course of his profession or not:" *Clarkson* v. *Robinson* ([1900] 2 Ch. 722). A power to transact business, "whether such business be usually within the business of a solicitor or not," and "to make the usual professional or other proper and reasonable charges for all business done and time expended in relation thereto" authorizes non-professional employment and charges: *In re Ames* (25 Ch. D. 72). So does a power to charge for business "including all business of whatever kind not strictly professional, but which might have been performed or would necessarily have been performed, in person by a trustee, not being a solicitor: " *In re Fish* ([1893] 2 Ch. 413). The residuary legatees were, however, authorized to examine the solicitor's books, and bring any contested item before the judge in Chambers.

Power in will.

Kay, J., said, *In re Chapple*, that a power to a solicitor to charge for non-professional expenses ought not to be put into a will drawn by himself unless he has been especially instructed to do so. But he surely understated the case. Any power to charge for services is a gift which arouses the suspicion of the Probate Court (*ante*, p. 80); a legacy, of which he deprives himself by attesting the will, *In re Pooley* (40 Ch. D. 1) citing *In re Barber*, *supra*, which abates on testator's bankruptcy, *In re White* ([1898] 2 Ch. 217), and on which legacy duty is payable: *In re Thorley* ([1891] 2 Ch. 613).

Miscellaneous outsiders.

A solicitor-trustee may always charge strangers believing themselves to be *c.q.t.* for skilled information about their rights: *In re Bosworth* (58 L. J. Ch. 432).

Power in *Bankruptcy Act*.

Sect. 73 (2) of the *Bankruptcy Act*, 1883, only enables a solicitor-trustee in bankruptcy to contract for remuneration for his professional services. See *In re Wayman* (24 Q. B. D. 68).

Settled accounts.

If the *c.q.t.* have allowed costs to the solicitor-trustee and the accounts are settled, the onus lies on them to prove that injustice has been done: compare *In re Cheeseman* ([1891] 2 Ch. 289); *In re Webb* ([1894] 1 Ch. 73).

Solicitor appearing in person.

In *London Scottish Benefit Society* v. *Chorley* (13 Q. B. D. 872, affirming 12 Q. B. D. 452), it was held that when a solicitor brings or defends an action in person, he is entitled to the same costs as an ordinary litigant appearing in person, subject to this restriction, that no costs which are in fact unnecessary can be recovered. Thus, he may charge costs out of pocket and what is done by his clerk, but not for instructions and attendances by himself.

Charge in favour of Solicitor.

GREER *v.* YOUNG.

(24 Ch. D. 545.)

Principle.

The 28th section of the Solicitors Act, 1860, *confers upon the Court a discretionary power to create a charge upon property recovered or preserved. Such charge is independent of contract and is in the nature of salvage.*

Summary of facts.

Mrs. Greer and her daughter had life interests, and certain infants had reversionary interests, under the will of W. J. Greer, of which Young and Pollock were trustees. Pollock lost a large portion of Greer's estate and died insolvent. In a suit instituted for the administration of his estate, Young carried in a claim in respect of the said loss.

Then Mrs. Greer and her daughter commenced the present action, to which the infants were not parties, and obtained the appointment of new trustees in place of Young and a declaration that Young and the estate of Pollock were liable, and that the proceeds of Young's proof were payable to the new trustees. The new trustees then obtained dividends from Pollock's estate and in Young's bankruptcy. The C. A. held that the solicitors who had acted in the present action were entitled to a charge on the dividend recovered in Young's bankruptcy, but not on the dividend recovered from Pollock's estate.

Solicitors Act, 1860, s. 28.

The Solicitors Act, 1860, s. 28, provides that where a solicitor is "employed to prosecute or defend any suit, matter, or proceeding in any court of justice, it shall be lawful for the Court" to declare him "entitled to a charge upon the property recovered or preserved," and the Court may make orders for taxing, raising, and paying such costs, charges, and expenses out of the property, and all conveyances and acts which shall operate to defeat such charge shall, unless made to a *bonâ fide* purchaser for value without notice, be void; but costs, charges, and expenses barred by any Statute of Limitations are not chargeable under this Act.

Discretionary power in the Court.

"The legislature," said Lord Selborne, in *Pinkerton* v. *Easton* (16 Eq. 490), "has given not a charge, but a power to the Court to create a charge for a solicitor's costs, 'upon property recovered or preserved' when meritorious services of the solicitor have resulted in such recovery or preservation." The Act gives a discretionary power to the Court, and the Court refused to exercise its discretion in *Harrison* v. *Cornwall & Co.* (53 L. J. Ch. 596); *Harrison* v. *H.* (13 P. D. 180); *Croghan* v. *Maffett* (28 L. R. Ir. 97) (other means untried); *Groom* v. *Cheesewright* ([1895] 1 Ch. 730) (other security); *Roche* v. *R.* (29 L. R. Ir. 339) (delay, etc.). Contrast *In re Born* ([1900] 2 Ch. 433) (delay).

"Preserved" and "recovered."

Property is "preserved" by an administration action in which a receiver is appointed, and which is then compromised behind the solicitor's back, *Twynam* v. *Porter* (11 Eq. 181); and the Statutes of Limitation do not run as long as the solicitor's name is on the record: *Baile* v. *B.* (13 Eq. 497). And property is "preserved" by defending a suit to set a deed aside, *Bulley* v. *B.* (8 Ch. D. 479); by defending probate, *Ex p. Tweed* ([1899] 2 Q. B. 167); by an action for dissolution of partnership, *In re Suffield and Watts* (20 Q. B. D. 693); by defending a redemption and foreclosure action, *Scholefield* v. *Lockwood* (7 Eq. 83); by resisting bankruptcy proceedings, *Ex p. Daniell* ([1900] 2 Q. B. 489); or by bringing an action against a pretended incumbrancer, *In re Fiddey* (7 Ch. 773); even when the proceedings end in a partially adverse judgment, *Smith* v. *Winter* (18 W. R. 447), or partially beneficial compromise: *Moxon* v. *Sheppard* (24 Q. B. D. 627).

Property is "recovered" by means of an action of detinue: *Catlow* v. *C.* (2 C. P. D. 362); compare *Briscoe* v. *B.* ([1892] 3 Ch. 543); an action to recover a debt: *Dallow* v. *Garrold* (14 Q. B. D. 543); or a petition by a wife for divorce when alimony is ordered under the Divorce Act, 1857, s. 32: *Harrison* v. *H.* (13 P. D. 180); by bankruptcy proceedings: *Ex p. Fanshawe* ([1897] 1 Q. B. 314).

Property is neither "recovered" nor "preserved" where an administration decree is obtained, and a new trustee appointed: *Pinkerton* v. *Easton* (16 Eq. 490); by proceedings in which alimony *pendente lite*, etc., is ordered: see *Harrison* v. *H.*, *supra;* by proceedings under the *Debtors Act*, 1869: *Ex p. Lloyd George* ([1898] 1 Q. B. 520); or other penal acts, except the *Larceny Acts*, etc. (*ib.*, p. 525); by resisting winding-up proceedings: *In re United Shepherds Co.* ([1885] W. N. 15). Proceedings out of Court are not within the Statute (*ib.*).

To what property it extends.

Unlike particular common-law lien, the charge extends over land: *Bonser* v. *Bradshaw* (4 Giff. 260); *Twynam* v. *Porter, ex p. Tweed* (*ubi supra*); and being in the nature of salvage and not of contract, affects the whole fund, including infants' interests, as in the l.c., partners' interests as in *Jackson* v. *Smith* (53 L. J. Ch. 972), the interests of married women restrained from anticipation, *In re Keane* (12 Eq. 115), and of parties not represented in the action, as in *Bailey* v. *Birchall* (2 H. & M. 371); *Charlton* v. *C.* (32 W. R. 90) †; *Bulley* v. *B.* (8 Ch. D. 479); and *Scholey* v. *Peck* ([1893] 1 Ch. 709). "It does not depend on contract. Contract does away with the notion of salvage. Therefore it is immaterial whether the property belongs to an infant; it is immaterial whether the person whose property is recovered employed the solicitor:" *Greer* v. *Young* (p. 552). Like particular common-law lien, it does not extend to easements: *Foxon* v. *Gascoigne* (9 Ch. 654); it attaches itself to moneys paid to compromise an action: *Cole* v. *Eley* ([1894] 2 Q. B. 350); (comp. *Ross* v. *Buxton* (42 Ch. D. 190); *In re Wright's T.* ([1901] 1 Ch. 317) (infants) as to common-law lien); to the proceeds of a *fi. fa.*: *Dallow* v. *Garrold* (14 Q. B. D. 543); *Birchall* v. *Pugin* (L. R. 10 C. P. 397); to costs of a Court of first instance actually paid and ordered by the C. A. to be refunded: *Guy* v. *Churchill* (35 Ch. D. 489); to money paid into Court by B. and paid out to A.: *Emden* v. *Carte* (19 Ch. D. 311); but only to the difference between a successful claim and successful counterclaim, *Westacott* v. *Bevan* ([1891] 1 Q. B. 774), and not to money paid into Court to answer a claim which is withdrawn (*ib.*), unless there is a collusive withdrawal of the claim, *Moxon* v. *Sheppard* (24 Q. B. D. 627); compare *In re Margetson & Jones* ([1897] 2 Ch. 314), *ante*, p. 111; nor to money paid into Court to answer a claim made in another Court, *Pierson* v. *Knutsford E. Co.* (13 Q. B. D. 666), nor to money paid by B. into Court to secure costs, and repayable to B. by reason of his success: *In re Wadsworth* (29 Ch. D. 517); and subject to set off: *Goodfellow* v. *Gray* ([1899] 2 Q. B. 498).

Who may sue.

The salvor's personal representative and the assign of his book debts may obtain this declaration of lien: *Baile* v. *B.* (13 Eq. 497); *Briscoe* v. *B.* ([1892] 3 Ch. 543); not the London agents: *Macfarlane* v. *Lister* (37 Ch. D. 88). But common-law lien, being assignable, extends to London agents: Cordery, Solicitors, 3rd ed., p. 360; *Lawrence* v. *Fletcher* (12 Ch. D. 858).

What costs are charged.

Under the statute only the taxed costs will be so charged if still taxable: *De Bay* v. *Griffin* (10 Ch. 291); *Charlton* v. *C. supra.* The costs of an arbitration, *Macfarlane* v. *Lister* (37 Ch. D. 88), are not taxable; nor are the costs of an ejectment payable out of mortgage moneys recovered by foreclosure: *Wilson* v. *Round* (4 Giff. 416); costs of appeal on summons for charging order are included: *Waterland* v. *Serle* ([1897] W. N. 163).

Priorities.

These orders are "in the nature of an execution," and the solicitor obtains his charge subject to equities. Thus, if the solicitor is discharged, or rightfully discharges himself, *Clover* v. *Adams* (6 Q. B. D. 622), before the money is actually received, his charge ranks subsequently to the statutory or equitable lien of the solicitor at the date of the recovery: *In re Wadsworth* (29 Ch. D. 517; 34 Ch. D. 155); in the case of three successive solicitors the last ranks first, and the solicitor before the C. A. ranks before the solicitor before the Court of First Instance: *In re Knight* ([1882] 2 Ch. 368).

It will override the rights of a prior assign (including mortgagees, garnishee creditors, etc.) if the assignment was made with knowledge, or after notice of the trial, *Cole* v. *Eley* ([1894] 2 Q. B. 350); *Faithful* v. *Ewen* (7 Ch. D. 495); *Dallow* v. *Garrold* (14 Q. B. D. 543)†; *North* v. *Stewart* (15 A. C. 452); *The Paris* ([1896] P. 77), or of a prior mortgagee who takes the benefit of an action, *Scholey* v. *Peck* ([1893] 1 Ch. 709), unless the assign has been led by the solicitor to suppose that the latter will not enforce his lien: *Macfarlane* v. *Lister* (37 Ch. D. 88). It will override the rights of a landlord threatening distraint, *In re Suffield and Watts* (20 Q. B. D. 693), and of the client's trustee in bankruptcy: *Emden* v. *Carte*, *supra; In re Graydon* ([1896] 1 Q. B. 417); *Jones* v. *Turnbull* (2 M. & W. 601) (common-law lien).

Practice in cases of statutory lien.

The order declaring the charge may be made, though the action was never heard or has come to an end: *In re Fiddey, Heinrich* v. *Sutton* (6 Ch. 865); *In re Fiddey, Jones* v. *Frost* (7 Ch. 773). In the K. B. D. the usual practice is to make the order on a summons *ex p.* before a judge in Chambers, and application should be to the judge who heard the action: *Catlow* v. *C.* (2 C. P. D. 362); *Higgs* v. *Schrader* (3 C. P. D. 252); *Clover* v. *Adams* (6 Q. B. D. 622). Similarly in bankruptcy: *Ex p. Cripps* ([1899] 1 Q. B. 863). The suggestion that the Judge in Bankruptcy only has power to make these orders *quâ* judge of the High Court, *Ex p. Fanshawe* ([1897] 1 Q. B. 314) was not endorsed in *Ex p. Daniell* ([1900] 2 K. B. 489). These orders are, however, seldom made in bankruptcy: *Ex p. Lloyd George* ([1898] 1 Q. B. 520). They can be made, during action, by a registrar: *Ex p. Fanshawe*. In the C. D. the order may be made on motion, petition, *Brown* v. *Trotman* (12 Ch. D. 880), or by summons, *Hamer* v. *Giles* (11 Ch. D. 942), but usually by summons. See R. S. C., App. K., No. 29, for form. The petition or summons must be intituled in the action, but not necessarily in the matter of the Act or of the solicitor: *Hamer* v. *Giles* (*supra*). The application should be made before the judge who heard the cause: *Heinrich* v. *Sutton* (*supra*); *Owen* v. *Henshaw* (7 Ch. D. 385). Only parties to the action whose interests are affected should be served: *Brown* v. *Trotman* (*supra*); *Jackson* v. *Smith* (53 L. J. Ch. 972). A stop order in addition to a charging order can only be obtained at applicant's expense: *Mildmay* v. *Quicke* (6 Ch. D. 553). An appeal will not be allowed for a trifling amount: *In re Nat. Assurance Ass.* (7 Ch. 221).

Non-statutory particular lien.

A solicitor, like an auctioneer, *Webb* v. *Smith* (30 Ch. D. 199), and other agents, has, independently of statute, a particular lien on his client's interest, *Verity* v. *Wilde* (28 L. J. Ch. 561), in a fund recovered or preserved for his client; and it has been held that where he also holds papers essential to the recovery of this fund, this lien will be general: *Worrall* v. *Johnson* (2 Ja. & W. 214). While the fund recovered is in the hands of third parties, this lien, in order to be operative, must be perfected by notice or stop order. These doctrines were old a century ago, *Read* v. *Dupper* (6 Term. 361); but never extended to "recovered land," *Shaw* v. *Neale* (6 H. L. C. 581, 601), nor to a trust estate preserved by an administration action: *Worrall* v. *Harford* (8 Ves. 4); but did extend to proceedings under the *Declaration of Titles Act* (25 & 26 Vict. c. 67), *Pritchard* v. *Roberts* (17 Eq. 222), and to Partition Actions where sale was ordered (*ib.*); to a wife's alimony, *pendente lite*, *Ex parte Bremner* (L. R. 1 P. & M. 254), if the solicitor has her written authority to receive it as her agent, *Cross* v. *Cross* (43 L. T. 533), and to cheques: *General Share Trust Co.* v. *Chapman* (1 C. P. D. 771). As to stop order, *Mildmay* v. *Quicke* (*supra*) applies. By proceeding under the Act, a solicitor does not waive his common-law lien, *De Bay* v. *Griffin* (10 Ch. 291); indeed, in most cases he only asserts it, as in *In re Born* ([1900] 2 Ch. 433).

A solicitor for a wife in divorce proceedings may enforce this particular lien over money paid by the husband into Court to secure costs, unless the solicitor himself has been guilty of acting vexatiously and oppressively: *Hall* v. *H.* ([1891] P. 302)†.

General lien of solicitor.

A solicitor is also entitled to a general lien for professional charges on all papers and documents other than a will, and also to articles of his client in his possession, delivered to be exhibited to witnesses: *Friswell* v. *King* (15 Sim. 191). This lien must not be used vexatiously, *In re Hawkes* ([1898] 2 Ch. 1)*; is unaffected by Statutes of Limitations; may be varied or abandoned by agreement; notice of it need not be given; the solicitor need not furnish copies of the documents so held, but must not hold them so as to imperil the property referred to in them: White on Solicitors, ch. xvi. If he has to hand them over to a new solicitor he should apply to the Court for an order under the Act of 1860, or obtain an undertaking from the solicitor: *Boden* v. *Hensby* ([1892] 1 Ch. 101). It is no answer to a summons for discovery to say that the solicitor has a lien on the deeds: *Lewis* v. *Powell* ([1897] 1 Ch. 678). For general lien over the title-deeds of a company, see *In re Capital Fire Ins. Ass.* (24 Ch. D. 408); *Brunton* v. *Electrical Engineering Co.* ([1892] 1 Ch. 434).

Common law lien, generally.

The cases on priority are decided on the same principles as those on the statute, subject to the above differences. Thus at common law the solicitor never gets a better title than his client, *e.g.* to charge a trust estate, *Lightfoot* v. *Keane* (1 M. & W. 745); *Horne* v. *Shepherd* (3 Jur. N. S. 806); *Ex p. Lloyd George* ([1898] 1 Q. B. 526): see subrogation, p. 210, or mortgaged estate, *In re Llewellin* ([1891] 3 Ch. 145), except to a bill of exchange under law merchant, *Redfern* v. *Rosenthal* (17 T. L. R. 638); and common-law general lien will not be enforced when a solicitor acts for two different parties with conflicting interests: *In re Snell* (6 Ch. D. 105), cited in *Macfarlane* v.

Lister (37 Ch. D. 88); and *In re Mason* v. *Taylor* (10 Ch. D. 729) (mortgages); *In re Lawrance* ([1894] 1 Ch. 556) (settlements); nor where he is trustee: *In re Newland* (4 Ch. D. 515). And lien is waived by acceptance of other security: *In re Taylor, Stileman, and Underwood* ([1891] 1 Ch. 599)†; *In re Douglas Norman & Co.* ([1898] 1 Ch. 199). No statute of limitations bars the common-law lien for costs: *Higgins* v. *Scott* (2 B. & Ad. 413); *In re Margetts* ([1896] 2 Ch. 263).

Practice in statutory and common law lien.

A client may apply by summons under R. S. C. O. LII., r. 25, O. LIV., r. 4*g* for money or securities held by the solicitor, and the Court may protect the solicitor's lien as it sees fit.

Mortgagee's Costs and Expenses.

NATIONAL PROVINCIAL BANK OF ENGLAND *v.* GAMES.

(31 CH. D. 582.)

Principle.

A mortgagee is entitled to be allowed all costs which he reasonably incurs in relation to the mortgage debt

Summary of facts.

Games deposited with the Bank certain title deeds and writings, accompanied by a memorandum by which he charged the lands to which the deeds and writings related with debts due or to become due from him to the Bank, and agreed upon request to execute a legal mortgage.

A surety had given a promissory note for part of Games's debt to the Bank, and some correspondence took place with the surety, from whom nothing could be recovered. The Bank called upon Games to execute legal mortgages, and after investigating Games's title prepared the deeds and corresponded with Games, who refused to execute the mortgages.

In an action for foreclosure by the Bank against Games's trustee in bankruptcy the trustee was ordered, by consent, to pay the debt and costs, "including therein any charges and expenses properly incurred by them as mortgagees," such costs to be taxed.

The Bank claimed: (1) Costs of correspondence with the surety; (2) with Games as to the legal mortgage; (3) costs of investigating Games's title; (4) and preparing the legal mortgages. The C. A. disallowed item (3), but allowed the rest.

Origin of the rule in contract.

The C. A. acted on Lord Cottenham's dictum in *Dryden* v. *Frost* (3 My. & Cr. 670, 675): "The Court, in settling the account between a mortgagor and mortgagee, will give to the latter all that his contract, or the legal or equitable consequences of it, entitle him to receive, and all the costs properly incurred in ascertaining or defending such rights, whether at law or in equity. In *Detillin* v. *Gale* (7 Vesey, 583, 585) Lord Eldon says that he ought to be indemnified to the extent that he acts reasonably as mortgagee; which must mean reasonably with respect to such rights as his mortgage title gives him." See *Stott* v. *Milne*, citing *Cotterell* v. *Stratton* and *Turner* v. *Hancock* (*ante*, p. 208). Although arising in contract, the right to indemnity does not create a common-law debt, *Ex p. Fewings* (25 Ch. D. 352), any more than the ordinary right to indemnity by trustees or *c.q.t.* against one another: *Ex p. Dyer* ([1901] 1 Q. B. 710). And it ranks no higher than the security to which it is tacked, and from which it is inseparable: *Burrowes* v. *Molloy*, 2 Jo. & La. 528; *Landowners, etc., Co.* v. *Ashford* (16 Ch. D. 433, 434).

Costs of investigation of title.

Item (3) was disallowed because the mortgagor only agreed to mortgage his estate and interest, and it was unnecessary to look into the title any further than to see in what form the mortgages ought to be drawn.

Costs of preparing the mortgage deed.

As to item (4) the C. A. rejected the argument that mortgagees' costs did not include the costs of proceedings between the mortgagor and mortgagee. "The plaintiffs had an equitable mortgage containing an agreement to execute a legal mortgage. They reasonably demanded a legal mortgage, and their costs in relation to it ought to be allowed. They will be allowed any charges and expenses properly incurred in or in reference to the preparation of the drafts, which will give them all they are entitled to in respect of such inspection of the deeds as was necessary," including counsel's fees: *Nicholson* v. *Jeyes* (22 L. J. Ch. 833).

Costs of correspondence.

With regard to item (1) it had been contended that as the mortgagee had two distinct positions—that of a creditor, and of a person holding security—he could not charge against the mortgagor his costs incurred in the latter character. To this the C. A. answered: "A mortgagee is a creditor, he has also a security for the debt, and whether he is trying to get his money from the mortgagor, or from a surety, or out of the mortgaged property, he is trying to enforce his rights as mortgagee. The costs of the correspondence with the surety must therefore be allowed. The costs of the correspondence with the mortgagor are even more clearly relative to the position of the plaintiffs as mortgagees."

Principle stated in Seton;

The following passage from Seton, 5th ed. p. 1613, was cited with approval by Cotton, L.J.: "Both in foreclosure and redemption actions the mortgagee is entitled to the costs of action, and also to all costs properly incurred by him in reference to the mortgaged property for its protection or preservation, recovery of the mortgage money, or otherwise relating to questions between him and the mortgagor, and to add the amount to the sum due to him on his security for principal and interest."

in R. S. C., 1883;

The provision as to costs in the Rules of the Supreme Court, 1883, O. LXV., r. 1, and cited in the Note (p. 211), applies to mortgagees as well as to trustees, etc.

and by Fry, J.

In *Ex p. Lickorish* (25 Q. B. D. 176), Fry, L.J., pointed out that under the ordinary contract of mortgage a mortgagor if he desired to redeem "must pay (1) the principal debt; (2) the interest thereon; (3) all proper costs, charges, and expenses incurred by the mortgagee in relation to the mortgage debt or the mortgaged security; (4) the costs of litigation properly undertaken by the mortgagee in reference to the mortgage debt or the security; (5) the mortgagee's costs of the redemption action:" so too a mortgagee who is plaintiff in a foreclosure action gets no costs, other than costs in the action, unless he makes out a special case as in *Bolingbroke* v. *Hinde* (25 Ch. D. 795), and *Wilkes* v. *Saunion* (7 Ch. D. 188).

Costs allowed.

A mortgagee cannot be deprived of his costs for a mere *bonâ fide* mistake in his account: *Bird* v. *Wenn* (33 Ch. D. 215) (where the mistake arose on questions as to consolidation); *Cotterell* v. *Stratton* (8 Ch. 295); *In re Watts* (22 Ch. D. 12, 13); *Hodges* v. *Croydon Canal Co.* (3 B. 86). As to the rule in Partition, see p. 147; in Administration, see p. 329.

Costs disallowed.

Costs were given against the mortgagee in *Henderson* v. *Astwood* ([1894] A. C. 161) (did not give information); *Charles* v. *Jones* (35 Ch. D. 544, 550) (makes gross error); *Nat. Bank of Australasia* v. *United Hand-in-Hand Co.* (4 A. C. 391); *Hall* v. *Heward* (32 Ch. D. 430, 436) (he claims the property); *Ashworth* v. *Lord* (36 Ch. D. 545, 551) (has no claim); *Squire* v. *Pardoe* (66 L. T. 243); *Credland* v. *Potter* (10 Ch. 8); *Forbes* v. *Jackson* (19 C. D. 622); *Tarn* v. *Turner* (39 Ch. D. 467); *Kinnaird* v. *Trollope* (42 Ch. D. 619–21); *Greenwood* v. *Sutcliffe* ([1892] 1 Ch. 1) (refused redemption).

(Cheque.)

(In the last case the redeemer tendered a cheque; as in *Farrer* v. *Lacy* (*infra*). The rule still holds that an authority to receive a deposit, or mortgage money, or arrears does not imply an authority to receive the same by cheque: *Johnston* v. *Boyes* ([1899] 2 Ch. 73); *Blumberg* v. *Life Interests, etc., Corp.* ([1897] 1 Ch. 171; [1898] 1 Ch. 27); *Papé* v. *Westacott* ([1894] 1 Q. B. 272).)

Expenses allowed.

A mortgagee in possession is in the same position as a trustee so far as his powers and liabilities are concerned: pp. 207, 239 *et seq.*; *Leith* v. *Irvine* (1 My. & K. 287). He cannot charge for personal services, except under the Act of 1895 (below). Expenses necessary for repairs, *Tipton Green Coll. Co.* v. *T. Moat Coll. Co.* (7 Ch. D. 192), and management, *Bompas* v. *King* (33 Ch. D. 279), are in the first instance chargeable against rent or profits, but have been charged on capital (*ib.*). Improvements (if required and proved to be beneficial), *Sandon* v. *Hooper* (6 B. 246; 14 L. J. Ch. 120); *Houghton* v. *Sevenoaks Co.* (33 W. R. 341); *Tipton, etc., Co.* v. *T., etc., Co., supra*, are charged in the first instance against capital: nor can a mortgagor claim the surplus proceeds of a sale by the mortgagee under his mortgage deed without crediting the mortgagee with the enhanced value produced by reasonable expenditure by the mortgagee: *Shepard* v. *Jones* (21 Ch. D. 469); *Henderson* v. *Astwood* ([1894] A. C. 150) (order). Compare *ante*, pp. 91, 131, 143, 209. So-called salvage expenses are rarely allowed in mortgages of a business: *Ex p. Grissell* (3 Ch. D. 411; *Falcke* v. *Scottish Imp. Ins. Co.* (34 Ch. D. 234); *Securities, etc., Inv. Corp.* v. *Brighton Alhambra* ([1893] W. N. 15). Other expenses charged on capital include fines, *Manlove* v. *Bale* (2 Ver. 83); *Provident, etc., Soc.* v. *Greenhill* (9 Ch. D. 122); copyhold, land-tax redemption (Seton), and enfranchisement expenses (57 & 58 Vict. c. 46, s. 39); premiums if not forbidden, *C. Act*, 1881, s. 19; stop orders if authorized, *Waddilove* v. *Taylor* (6 Ha. 307); an abortive sale even though he accepted a bad cheque as deposit, *Farrer* v. *Lacy* (31 Ch. D. 42): compare *Wilkes* v. *Saunion* (7 Ch. D. 188). Expenses chargeable on capital carry interest (Seton, *ubi supra*). If necessary for his security the mortgagee may commit legal, but not equitable waste: *Millett* v. *Davey* (31 B. 470); *Taylor* v. *Mostyn* (33 Ch. D. 226), see p. 130. As to timber, see p. 132.

Apportionment. Costs, etc., are rateably apportioned as against two estates, where there is no consolidation: *De Caux* v. *Skipper* (31 Ch. D. 635).

Costs of other incumbrancers. In *Johnstone* v. *Cox* (19 Ch. D. 17) the order originally made might have led, as the C. A. said, "to a parody on the administration of justice" by sweeping away the entire fund. On appeal the general rule was laid down that "the costs of incumbrances are allowed to be added to their securities if any difficult questions arise as to the priority of incumbrances, and so on; and unless there has been something vexatious or something unusual in his conduct, the incumbrancer gets his costs if the fund is sufficient to pay them." The Court, however, has a discretion in priority cases, and can order one or other of the parties to pay the costs if a case for it is made out: *Harpham* v. *Shacklock* (19 Ch. D. 207, 215).

Appeal. Appeal lies on the question whether the Court has applied the right rule of law, or exercised any discretion; but if the Court exercises a discretion as to costs only, no appeal lies without leave: *Bew* v. *B.* ([1899] 2 Ch. 467), citing *Charles* v. *Jones* (33 Ch. D. 80); *In re Beddoe* ([1893] 1 Ch. 547, 556); *In re Chennell* (8 Ch. D. 492). And see *Johnstone* v. *Cox, supra*, and *ante*, p. 212.

Agents. Agents can be employed to collect rents: *Davis* v. *Dendy* (3 Mad. 170); *Union Bank* v. *Ingram* (16 Ch. D. 53); *Ex p. Lickorish* (25 Q. B. D. 182), clerks, bailiffs, consignees: *Leith* v. *Irvine, supra*, auctioneers: *Field* v. *Hopkins* (44 Ch. D. 524), as in trustee cases, pp. 172 *et seq.*

A solicitor charges for the amount of incumbrances subject to which a mortgagor or second mortgagee sells: *Fortescue* v. *Mercantile B.* ([1897] 2 Q. B. 236). For receiver, see p. 387.

Act of 1895.

The *Mortgagees Legal Costs Act*, 1895 (58 & 59 Vict. c. 25), provides that a solicitor-mortgagee shall be entitled to the same costs, etc., as though he were retained by the mortgagee. Sect. 2 applies to "all business transacted and acts done" by him "in negotiating the loan, deducing and investigating the title to the property, and preparing and completing the mortgage," such costs, etc., to be "recoverable from the mortgagor." Sect. 3 applies to "all business transacted and acts done" by him, "subsequent and in relation to such mortgage or to the security thereby created or the property therein comprised;" such costs, etc., to be added to the security or recovered from the person on whose behalf the same is done. Again, sect. 2 applies to mortgages to a solicitor after the Act; sect. 3 to mortgages to or vested in a solicitor, and includes acts and mortgages before the Act. Both sections include acts by the firm of which the solicitor-mortgagee is member, and include cases where he is joint mortgagee. Sect. 3 does not apply to orders and judgments given before the Act: *Eyre* v. *Wynn-Mackenzie* ([1896] 1 Ch. 135); *Day* v. *Kelland* ([1900] 2 Ch. 745).

Jurisdiction.

The *County Courts Act*, 1888, s. 67, gives a County Court judge the power of a judge of the Chancery Division of the High Court in actions for foreclosure or redemption, or for endorsing any charge or lien where the mortgage charge or lien does not exceed in amount the sum of £500. In *Crozier* v. *Dowsett* (31 Ch. D. 67), where the parties lived in the same place, and an action was brought to foreclose a mortgage for £66, it was held, following *Simons* v. *McAdam* (6 Eq. 324), that the plaintiff was only entitled to County Court costs. Contrast *Scotto* v. *Heritage* (3 Eq. 212); *Brown* v. *Rye* (17 Eq. 343); *Williams* v. *Allen* (60 L. T. 103), where the costs of proceedings in the High Court were allowed.

Where the subject-matter is below £10 in value, action cannot be brought in the High Court: *Westbury R. S. A.* v. *Meredith* (30 Ch. 387).

Judgment in Mortgage Actions.

DYMOND *v.* CROFT

(3 Ch. D. 512.)

Principle.

A mortgagee may since the Judicature Act combine in one action the personal remedy on the covenant with remedy by foreclosure.

Summary of facts.

A mortgagee brought an action for foreclosure and claimed by his writ an order directing personal payment of the mortgage debt as well as the usual judgment for foreclosure. The Registrar declined to insert the order for personal payment as being contrary to the practice of the Court of Chancery in foreclosure suits, but Jessel, M.R., directed that the judgment should be drawn up as claimed by the writ.

Mortgagees' double relief under *Judicature Act*, 1873.

In this case the mortgagee claimed to be entitled, by reason of the *J. Act*, to a double relief—namely, the equitable judgment for foreclosure and judgment on the covenant at Common Law. "Both forms of relief," said Jessel, M.R., "are expressly claimed. There is no reason now why they should not be combined, and the judgment may be drawn up accordingly."

"Before the *J. Act*," said Fry, L.J., in *Farrer* v. *Lacy* (31 Ch. D. 42, 49)*, "a mortgagee had two rights which were enforced in different tribunals—an action at law against the mortgagor personally, and a suit in equity against the mortgaged property. If he desired judgment on the covenant against the mortgagor he could have brought an action at common law, and if he succeeded, he got an immediate judgment for principal, interest, and costs of that action. If he wished to foreclose his mortgage, he must have proceeded in a Court of Equity, in which a different account from that in the action at law would have been directed, and the costs of suit would have been added to his costs as mortgagee. The *J. Act* has enabled the two rights to be enforced together by one proceeding in one and the same Court." In this case the mortgagee brought his action, claiming—

(1) an account and (2) payment of what was due; (3) foreclosure or sale. The defendant claimed six months', and the Court allowed one month's grace, from the date of the certificate finding the amount due. Fry, L.J., said: "It has been contended that the result of the *J. Acts* has been to preclude the plaintiff in his action on the covenant, now that it is brought in the Ch. D., from obtaining immediate payment, as by sect. 25, sub.-sect. 11 of the *J. Act*, 1873, the rules of equity are now to prevail, payment is to be postponed for six months. No rule of equity exists that a sum immediately payable at law shall not be payable for six months; and in my judgment if at the hearing the amount due should be proved, agreed to, or admitted, there should be an order for immediate payment, with so much of the costs only as would have been incurred if the action had been on the covenant simply. There is no obligation to postpone payment, but I think it is competent to the judge to postpone payment for such a time as he may think reasonable; nothing that I am saying must be treated as in any way interfering with the discretion of a judge. The strict right which the Court may, if it will, give effect to, is immediate payment of the sum ascertained at the hearing." For a refusal to postpone payment see *Instone* v. *Elmslie* (34 W. R. 592).

Forms of orders.

The following were the forms of orders settled by the C. A. in *Farrer* v. *Lacy*:—

If the debt and interest is proved, admitted, or agreed at the trial.

"This Court doth order and adjudge that the plaintiff [*name*] do recover against the defendant [*name*] £ , being the total of the principal sum of £ , and of £ for interest thereon at £ per centum per annum less tax, to the day of [*the date of the judgment*], and also so much of his costs of this action as would have been incurred if it had been brought for payment only, such costs to be taxed by the Taxing Master.

If the debt and interest is not proved, admitted, or agreed at the trial.

"This Court doth order and adjudge that the following account be taken:—

"1. An account of what is due to the plaintiff for principal and interest under the defendant's covenant to pay contained in the indenture of mortgage, dated [*or* promissory note, *or as the case may be*] in the pleadings mentioned.

"And it is ordered that the plaintiff [*name*] do recover against the defendant [*name*] the amount which shall be certified to be due to him on taking the said account, and also so much of his costs of this action as would have been incurred if it had been brought for payment only, such costs to be taxed by the Taxing Master.

In either event, add—

"And it is ordered that the following [*further*] accounts be taken:—

"2. An account of what is due to the plaintiff under and by virtue of his mortgage security dated in the pleadings mentioned, and for his costs of this action, to be taxed by the Taxing Master, and in taking such account what if anything the plaintiff shall have received from the defendant, under the aforesaid judgment, is to be deducted, and the balance due to the plaintiff is to be certified."

The remaining portion of the judgment then provides for further accounts, and finally directs that in default of payment the defendant shall be foreclosed from all "right, title, interest, and equity of redemption" in the premises: Seton, 5th ed. p. 1576 *et seq.*

Order for interest,

In *Poulett* v. *Hill* ([1893] 1 Ch. 277) a mortgagee commenced an action in a similar form to that in *Farrer* v. *Lacy*, and, before judgment, commenced a second action for interest, most of which had accrued due since the date of the first action, and endorsed this writ for the amount under Order III., r. 6. It was held that this second action was improperly brought, as the form of judgment in the first action would be the same as that in *Farrer* v. *Lacy*, and would include an order to pay all arrears of interest up to the date of judgment.

for receiver,

See *Simmons* v. *Blandy* ([1897] 1 Ch. 19) for form of order where a receiver has been appointed. Recourse may be had to O. XIV. where there is a receiver, but leave to defend will be accorded: *Lynde* v. *Waithman* ([1895] 2 Q. B. 180). The form in *Coleman* v. *Llewellin* (34 Ch. D. 143) should not be followed except in special circumstances: *Cheston* v. *Wells* ([1893] 2 Ch. 151).

for instalments,

See *Greenough* v. *Littler* (15 Ch. D. 93) for the form of foreclosure judgment where the mortgage debt is payable by instalments.

in equitable mortgages,

For the future the judgment in the case of an equitable mortgage will contain directions that upon default the mortgagor will be foreclosed, that the hereditaments will be discharged from all equity of redemption, and that a conveyance must be executed: *Lees* v. *Fisher* (22 Ch. D. 283). But legatees of sums charged by will on land are only entitled to sale, not to foreclosure: *In re Owen* ([1894] 3 Ch. 220)†. See Seton, 5th ed. p. 1696.

staying action.

If the amount due will clearly exceed the value of the property, an order will be made staying the prosecution of accounts and inquiries directed by a judgment in the nature of a foreclosure judgment (unless the other side give security for costs): *Exchange and Hop Warehouses* v. *Ass. of Land Financiers* (34 Ch. D. 195).

Commencement of action by originating summons, O. LV., rr. 5A, 5B;

R. S. C., O. LV., rr. 5A and 5B, enables "any mortgagee or mortgagor whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage whether legal or equitable," to take out as of course an originating summons for "sale foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession," redemption, or reconveyance.

5B. "The person to be served with the summons under the last proceeding shall be such person as under the existing practice of the Chancery Division would be the proper defendant to an action for the like relief as that specified by the summons."

Since the date of this order a plaintiff who commences an action for foreclosure or redemption by writ under the old practice will be liable to pay the extra costs involved: *O'Kelly* v. *Culverhouse* ([1887] W. N. 36); *Barr* v. *Harding* (58 L. T. 74) (foreclosure); *Johnson* v. *Evans* (60 L. T. 29) (redemption); *secus* where immediate payment is asked for: *Brooking* v. *Skewis* (58 L. T. 73). Ditto with debenture-holders: see *Oldrey* v. *Union Works* ([1895] W. N. 701).

by specially endorsed writ, O. XIV. and O. III., r. 6.

No endorsement is special within the meaning of O. III., r. 6, unless it is confined to the claim mentioned in the rule; consequently a writ endorsed for a liquidated mortgage debt and also for foreclosure, etc., is not specially endorsed within the meaning of the rule: *Imbert-Terry* v. *Carver* (34 Ch. D. 506).

A demand for interest is not a demand for a liquidated sum where accounts have been ordered and a receiver has been appointed: *Poulett* v. *Hill*, *Lynde* v. *Waithman* (*supra*).

O. XV.

An order for foreclosure ought not to be granted on a writ of summons for accounts under O. XV.: *Bissett* v. *Jones* (32 Ch. D. 637); but see *Dyott* v. *Nevile* ([1887] W. N. 35); *Horton* v. *Bosson* (80 L. T. 435), which also discusses jurisdiction under O. XXX.

Parties.

"According to the general rule, all persons interested in the security, or in the equity of redemption, must be before the Court, or sufficiently represented:" Seton, 5th ed. p. 1599; and see O. LV., r. 5B, above; Coote on Mortgages, ch. 78, sect. 13. A first mortgagee who is plaintiff, and is also one of the second mortgagees, must not be joined as defendant: *Wavell* v. *Mitchell* (64 L. T. 560). Trustees and executors sufficiently represent their *c.q.t.* (*In re Mitchell*, 65 L. T. 851): *In re Booth and Kettlewell's C.* (67 L. T. 550); *Jennings* v. *Jordan* (6 A. C. 710) and O. XVI., r. 8 (1893). A remainderman may not redeem without the limited owner's consent: *Prout* v. *Cock* ([1896] 2 Ch. 808). In *Aylward* v. *Lewis* ([1891] 2 Ch. 81), the defendant to a foreclosure action died insolvent before the foreclosure was made absolute. There was no legal representative of his estate, but an order was made in Chambers under O. XVI., r. 46, appointing one of his next-of-kin to represent his estate for the purposes of the action. The Court, however, refused to make the foreclosure absolute in the absence of a properly constituted representative of the mortgagor. And see *Bolton* v. *Salmon* ([1891] 2 Ch. 48, 52) (tenants in common); *Griffith* v. *Pound* (45 Ch. D. 553); *Fairfield & Co.* v. *London and East Coast, etc., Co.* ([1895] W. N. 64); *In re Continental Oxygen Co.* ([1897] 1 Ch. 511); *Wallace* v. *Evershed* ([1899] 1 Ch. 891) (all debenture-holders necessary).

Procedure on default of appearance, O. XIII., r. 3.

In *Bissett* v. *Jones* (32 Ch. D. 635) the defendant did not appear, and the plaintiff claimed under O. XIII., r. 3, immediate judgment for a specific sum for principal and interest, and under O. XV. an account and foreclosure. He was held entitled to judgment for the liquidated amount, notwithstanding the fact that an account had been asked, but not to foreclosure; Chitty, J., declining to follow his own previous decision on this point in *Smith* v. *Davies* (28 Ch. D. 650); and see *Blake* v. *Harvey* (29 Ch. D. 827).

O. XXVII., r. 11.

Where the writ is endorsed for foreclosure, but not for payment, and defendant does not enter an appearance, plaintiff cannot claim payment by his statement of claim, and proceed to judgment for such payment under O. XXVII., r. 11: *Law* v. *Philby* (35 W. R. 401, 450).

And where the statement of claim alleges that a liquidated amount is due, but claims an account of what is due and payment of the amount found due and foreclosure, etc., and defendant does not appear, plaintiff cannot obtain judgment for the amount alleged to be due under O. XXVII., r. 11: *Faithfull* v. *Woodley* (43 Ch. D. 287). See also *Hunter* v. *Myatt* (28 Ch. D. 181); *Platt* v. *Mendell* and *Doble* v. *Manley* (below).

Redemption before date of payment.

A mortgagor may redeem a mortgage before the date for payment if a mortgagee proceeds to realize this security, *e.g.* (1) by entering into possession, *Ex p. Wickens* ([1898] 1 Q. B. 543); *Bovill* v. *Endle* ([1896] 1 Ch. 648) (unless permission is temporary only); *Ex p. Ellis* ([1898] 2 Q. B. 79); (2) or by sale with mortgagor's consent, *West* v. *Diprose* ([1900] 1 Ch. 337), (3) and under O. LVII., r. 12, under exceptional circumstances, on a sale by the sheriff, *Forster* v. *Clowser* ([1897] 2 Q. B. 362), (4) in company cases on a winding up, *Wallace* v. *Universal Automatic M. Co.* ([1894] 2 Ch. 547). He may not anticipate the date fixed by judgment for redemption: *Hill* v. *Rowlands* ([1897] 2 Ch. 361).

Periods for redemption.

Where there are successive incumbrancers the usual practice was to allow six months from the date of the certificate to the party first entitled to redeem, and three months each to succeeding parties: Seton, p. 1641. But this is a right which the puisne incumbrancers must claim: *Platt* v. *Mendel* (27 Ch. D. 246). The rule unanimously adopted by the judges was thus stated by Chitty, J., in *Doble* v. *Manley* (28 Ch. D. 664):—

"That where the defendants did not appear, one time only should be fixed for redemption whether the statement of claim alleged that they were entitled or only that they claimed to be entitled to incumbrances. To fix several successive periods was to make a decree as between co-defendants which should not be granted except upon the request of a defendant. If any subsequent mortgagee appeared and claimed to have successive periods fixed, the Court would have to consider whether he was entitled to them." Compare *Smith* v. *Olding* (25 Ch. D. 462).

Priority not decided on originating summons.

Where there is no dispute about priority the Court will not give successive periods as of course: *Smithett* v. *Hesketh* (44 Ch. D. 161); *Tufdnell* v. *Nicholls* (56 L. T. 152). For order where one period is named, see *Biddulph* v. *Billiter, etc., Co.* ([1895] N. W. 98). The Court will not decide questions of priority on an originating summons: *In re Giles, Real, etc., Advance Co.* v. *Michell* (43 Ch. D. 391); therefore where there is a dispute about priority the Court will not on an originating summons allow successive periods for redemption.

Interval for sale.

In ordering a sale the Court fixed three months' interval from the date of certificate in *Green* v. *Biggs* (52 L. T. 680) and *Jones* v. *Harris* (55 L. T. 884); in *Charlewood* v. *Hammer* (28 Sol. J. 710) an immediate sale was ordered; in *Wade* v. *Wilson* (22 Ch. D. 235) (as cited [1885] W. N. 128), the interval was one month.

The summons ought to but need not claim possession: *Jenkins* v. *Ridgeley* (41 W. R. 585); *Le Bas* v. *Grant* ([1895] W. N. 28); *Best* v. *Applegate* (37 Ch. D. 42); and the order *nisi* for foreclosure ought to provide for delivery of possession in default of redemption: *Williamson* v. *Burrage* (56 L. T. 702); but see *Keith* v. *Day* (39 Ch. D. 452).

Possession claimed,

An order for the delivery of possession of mortgaged property, forming part of a judgment for foreclosure absolute, ought to contain a description of the property as set forth in the mortgage deed, in order that the sheriff may identify the property of which he is ordered to deliver possession: *Thynne* v. *Sarl* ([1891] 2 Ch. 79); O. XVIII., r. 2. For proceedings for foreclosure absolute see *National, etc., Society* v. *Raper* ([1892] 1 Ch. 54).

and ordered.

Where a mortgagee claims payment of the debt, the statement of claim should contain an express statement of the covenants relied on: *Law* v. *Philby* (35 W. R. 401).

Statement of claim.

Special facts which may affect the amount due on the mortgage, *e.g.* the valuation of a security in bankruptcy, must be pleaded or mentioned to the Court before judgment: *Sanguinetti* v. *Stuckey's Banking Co.* (2) ([1896] 1 Ch. 502).

Sect. 15 of the *C. Act*, 1881, which is retrospective and compulsory, provides that "where a mortgagor is entitled to redeem he shall by virtue of this Act have power to require the mortgagee, instead of reconveying and on the terms on which he would be bound to reconvey, to assign the mortgage debt and convey the mortgaged property to any third person as the mortgagor directs, and the mortgagee shall by virtue of this Act be bound to assign and convey accordingly." The section does not apply where as in building society mortgages there is no assignable power of sale, *In re Rumney & Smith* ([1897] 2 Ch. 351), nor to a mortgagee being or having been in possession. As to whom see *Quarrell* v. *Beckford* (1 Ma. 269); *Hall* v. *Heward* (32 Ch. D. 430); *In re Prytherch* (42 Ch. D. 590). For form of reconveyance, see *Plomley* v. *Felton* (14 A. C. 61).

Conveyance to third party under *Conveyancing Acts*, 1881,

Sect. 12 of the *C. Act*, 1882, passed in consequence of *Teevan* v. *Smith* (20 Ch. D. 724), provides that this right shall belong to and be capable of being enforced by each incumbrancer or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer shall prevail over a requisition of the mortgagor, and as between incumbrancers a requisition of a prior incumbrancer shall prevail over a requisition of a subsequent incumbrancer.

and 1882.

A tenant for life of mortgaged premises who has failed to keep down the interest, and who has obtained an order to redeem on terms protecting the remainderman against further costs, is not entitled to require the mortgagee to transfer the mortgage debt and premises to a third person: *Alderson* v. *Elgey* (26 Ch. D. 567).

In *Everitt* v. *Automatic Weighing Machine Co.* ([1892] 3 Ch. 506), a company which had a lien on its shareholders' shares was compelled to transfer it to a nominee of a shareholder under these sections. Compare *Smithett* v. *Hesketh* (*ubi supra*). A transferee (or depositee)

Mortgagees of shares.

of shares by way of security for a debt is entitled to foreclosure (and transfer): *General Credit Co.* v. *Glegg* (22 Ch. D. 549); *Harrold* v. *Plenty* ([1901] 2 Ch. 314); distinguishing *Carter* v. *Wake* (4 Ch. D. 605); *France* v. *Clark* (26 Ch. D. 830), as cases of pledges; pledgees, like chargees, *In re Owen* ([1894] 3 Ch. 226), being only entitled to an order for sale. A mortgagee in possession of shares has an implied power to sell them after a reasonable interval: *Deverges* v. *Sandeman* ([1901] 1 Ch. 70).

Mortgagees of reversionary choses in action.

A mortgagee of reversionary personalty cannot demand payment of the whole fund by the trustees for the mortgagor. It had been thought that this result followed from *Tancred* v. *Delagoa Bay Co.* (23 Q. B. D. 239), and other cases on p. 24, *supra*, and from the receipt clauses in the *C. Acts;* but this fallacy was dispelled by *In re Bell* ([1896] 1 Ch. 1), and *Hockey* v. *Western* ([1898] 1 Ch. 350), in cases where the trustees suspect the existence of other claimants.

Mortgagees of partnership share.

A partner's mortgagee may call the co-partner to account on a winding-up: *Watts* v. *Driscoll* ([1901] 1 Ch. 294).

Mortgage—Sale by the Court.

UNION BANK OF LONDON *v.* INGRAM.

(20 Ch. D. 463.)

Principle.

The Court has now, under the Conveyancing Act, 1881, *s.* 25, *jurisdiction to order a sale of mortgaged property at any time before the foreclosure has become absolute.*

Summary of facts.

The Union Bank of London, as second mortgagees, brought an action for redemption and foreclosure against the first mortgagee in possession, six subsequent incumbrancers, and the trustee in bankruptcy of the mortgagor. A complicated judgment was made, allowing successive rights of redemptions and foreclosures to the Bank, the six incumbrancers, and the trustee in bankruptcy. The Bank redeemed the first mortgagee, and then applied to the Court for an order for sale. Evidence was produced that the utmost value of the property was less than the amount due to the Bank. The C. A. granted the order.

Conveyancing Act, 1881, s. 25.

The *C. Act*, 1881, s. 25, provides that:

"(1) Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption, in the alternative.

"(2) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the Court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, *direct a sale* of the mortgaged property on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum fixed by the Court, to meet the expenses of sale and to secure performance of the terms." Sub-sect. 3 enables the Court to order security for costs. Sect. 5 enables the Court to direct payment into Court of the amount necessary to pay off incumbrances. And see now R. S. C., 1883, O. LI.

Effect of the section.

The Court considered in the l.c. that the words "instead of a foreclosure," which were contained in the corresponding section of the *Chancery Procedure Act*, 1852, were designedly omitted after the words "direct a sale;" it was accordingly held that a sale could be ordered at any time before the judgment for foreclosure became absolute. See *Western* v. *Davidson* ([1882] W. N. 28), where, however, the mortgagor who requested a sale had to pay costs, etc. "The Act," the Court said, "is an enabling and remedial statute, giving the Court a very beneficial power, and it ought therefore to be construed liberally." "One effect of it," said Jessel, M.R., "is to allow a mortgagor whose property is worth more than the mortgage money, but who cannot raise it, to obtain a sale and get the benefit of the surplus. The Court has power to impose terms so as to take care that no injustice shall be done to any one, and I think that the legislature has given it jurisdiction to make the order at any time before foreclosure absolute."

Order for sale.

In *Woolley* v. *Colman* (21 Ch. D. 169), the Court made an order for sale by the mortgagor on an interlocutory application by him before trial, but security for costs was ordered. In *Davies* v. *Wright* (32 Ch. D. 220), where an equitable mortgagee asked for a sale, the judge to whom the question was left by consent, gave the conduct of the sale to the mortgagor, as it was more to his interest that the best price should be obtained, and considered that security for costs need not be given.

In *Brewer* v. *Square* ([1892] 2 Ch. 111) the mortgagors requested a sale out of Court by them, although the mortgagees had a right, and desired to exercise their statutory power of sale immediately. Permission was given to the mortgagor to sell within three months on giving security for costs. In these three cases a reserve price was fixed, and the purchase-money was ordered to be paid into Court.

In *Norman* v. *Beaumont* ([1893] W. N. 45) the first mortgagees applied for foreclosure on the ground that the security was insufficient to pay them. The fourth mortgagee adduced evidence that the security was worth far more, and asked for and obtained the conduct of the sale on paying 10 per cent. of his estimated value into Court. But there is, according to *Christy* v. *Van Tromp* ([1886] W. N. 111), no general rule as to who shall conduct the sale.

Equitable mortgagee.

In *Oldham* v. *Stringer* (33 W. R. 251) the Court ordered a sale in lieu of a foreclosure at the request of an equitable mortgagee by deposit of deeds, though the deposit was not accompanied by any agreement to execute a legal mortgage.

Qualified order.

In *Wade* v. *Wilson* (22 Ch. D. 235), where mortgagee asked for a sale and mortgagor did not appear, the Court ordered an account, and then that only so much of the property should be sold as would be sufficient to satisfy mortgagee's claim.

Order refused.

In *Merchant Banking Co.* v. *London and Hanseatic Bank* (55 L. J. Ch. 479) the estate was insufficient to cover the first mortgage, but the second mortgagees and the mortgagor produced evidence that the value of the property had increased and was likely to increase, and they asked for a sale, offering at the same time to pay into Court a sum sufficient to cover costs. The Court considered that their discretion ought to be judicially exercised, that it was not just that the rights of the mortgagee should be postponed by a speculative sale, and refused the application.

In *Provident Clerks M.L. Ass.* v. *Lewis* (67 L. T. 644) North, J., refused to order a sale at the request of the second mortgagees, as he was not satisfied that the security was sufficient to cover the first mortgage, and the property consisted of freeholds and leaseholds in several places, and could not be put up for sale in one lot, so that a reserve price to protect the first mortgagee could not be fixed. In *Smithett* v. *Hesketh* (44 Ch. D. 161, 163) North, J., refused a sale as there was no evidence of value. Sale was refused in *Hopkinson* v. *Miers* (34 Sol. J., 128) on similar grounds.

Time for sale.

The time within which a sale is ordered is usually three months. See p. 238.

Mortgagees not trustees.

Mortgagees selling on an order of Court are in the same position as mortgagees exercising the power of sale conferred by the *C. Act*, 1881, s. 19: *Union Bank* v. *Munster* (37 Ch. D. 51). A mortgagee who exercises a power of sale is trustee of the proceeds for the parties interested: *Matthison* v. *Clarke* (3 Dr. 3); *Thorne* v. *Heard*, p. 203. He is liable if he pays the surplus to the wrong parties, *Magnus* v. *Queensland National Bank* (37 Ch. D. 466), or allows it to lie idle even for a few months: *Charles* v. *Jones* (35 Ch. D. 544); *Eley* v. *Read* (76 L. T. 39). He must employ it to satisfy the beneficiaries of whom he has notice or he must pay it into Court forthwith, and this rule even extends to a case where he concurs in a sale by a mortgagor and receives his mortgage debt out of the purchase-money: *West London Commercial Bank* v. *Reliance P. B. Soc.* (29 Ch. D. 954). But in exercising his power of sale he is not, except as to the surplus of the proceeds of sale over the mortgage money, a trustee for the mortgagor, *Warner* v. *Jacob* (20 Ch. D. 220), and if he exercises his power *bonâ fide* for the purpose of realizing his debt, without corruption or collusion with the purchaser, the Court will not interfere, even though the sale be disadvantageous, unless the price is so low as to be evidence of fraud (*ib.*). In *Kennedy* v. *De Trafford* ([1897] A. C. 180)* he sold to a co-mortgagor for the amount of the mortgage, in *Farrar* v. *Farrars* (40 Ch. D. 397) to a company promoted by the mortgagee at an undervalue, in *Nutt* v. *Easton* ([1900] 1 Ch. 29), to his solicitor, and the sale was upheld. In *Farrar* v. *Farrars* (40 Ch. D. 411) Lindley, L.J., described the duties of a mortgagee-vendor thus: "If in exercise of his power he acts *bonâ fide* and takes reasonable precautions to obtain a proper price the mortgagor has no redress, even although more might have been obtained for the property if the sale had been postponed:" cited in *Kennedy* v. *De Trafford* ([1896] 1 Ch. 772), and paraphrased thus by Lord Macnaughten: if he "takes pains to comply with the provisions of the power and acts in good faith I do not think his conduct in regard to the sale can be impeached" (S. C. 1897, A. C. 192). As to his liability for mistake see *Tomlin* v. *Luce* (43 Ch. D. 191). A sale to himself or a trustee for himself is invalid, *Henderson* v. *Astwood* ([1894] A. C. 150). In *Martinson* v. *Clowes* (21 Ch. D. 857; [1885] W. N. p. 41), the property was sold in lots by auction by a building society who were mortgagees selling under their power of sale, and their secretary openly bid for and purchased two lots on his own account, and it was held that the sale must be set aside. Compare *National B. of Australasia* v. *United Hand-in-Hand Co.* (4 A. C. 391). A purchaser from a mortgagee selling under the C. A., 1881, s. 19, is not precluded from inquiring into his capacity to sell: *Life Interest, etc., Corp.* v. *Hand-in-Hand Ins. Soc.* ([1898] 2 Ch. 230), citing *Dicker* v. *Angerstein* (3 Ch. D. 600). See as to the Court granting an injunction to restrain a mortgagee from exercising his power of sale, *post*, p. 379. Sales by a trustee in bankruptcy to himself, etc., are forbidden by Bank. R., 1886, r. 316. *Ex p. Gallard* ([1897] 2 Q. B. 8).

Application is made by originating summons under O. LV., r. 5A, cited in the preceding chapter, or by summons in Chambers under O. LV., r. 2 (14). If sect. 5 of the *C. Act*, 1881, is not applied, or some incumbrancers are not parties, the sale is made "$\left\{\begin{matrix}\text{free from}\\ \text{subject to}\end{matrix}\right\}$ the incumbrances of such of the incumbrancers (if any) as $\left\{\begin{matrix}\text{shall}\\ \text{shall not}\end{matrix}\right\}$ consent to the sale:" Daniel's Chancery Forms, ed. 1901, Form 1282. Practice.

An originating summons can be amended without a summons (*ib.* F. 1078). For form to amend originating summons see Marcy and Dodd on Originating Summons, Form 55.

Real Property Limitation Act, 1874—*Mortgage Debts.*

SUTTON *v.* SUTTON.

(22 Ch. D. 511.)

Principle.

After twelve years from the last payment of interest or acknowledgment in writing of debt the personal remedy of the mortgagee upon the covenant is barred, as well as the remedy against the land.

Summary of facts.

The plaintiff brought an action in 1882 on a covenant contained in a certain indenture executed in May, 1868, for payment of £1850 with interest at 5 per cent., together with all the costs "relating to the said indenture and attending the execution of the trusts and powers contained therein."

The defence was that the indenture of May, 1868, was in fact a mortgage of certain lands, and that no part of the principal nor any interest thereon had been paid by the defendant since November, 1869, which was more than twelve years before the commencement of the action, and the defendant claimed the benefit of the *Real Property Limitation Act,* 1874.

The C. A. decided against plaintiff.

Statutes of Limitations.

Sect. 8 of the *R. P. L. Act,* 1874 (37 & 38 Vict. c. 57), provides that "no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same." Two exceptions follow, "Unless in the mean time (1) some part of the principal money or some interest thereon shall have been paid, or (2) some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent." In these two cases "no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment or the last of such payments or acknowledgments, if more than one, was given." Sects. 1 and 7 of the same Act, supplemented by 7 Will. IV. & 1 Vict. c. 28 (as amended by the Act of 1874, s. 9), extended similar protection to mortgagors and mortgagees against actions for foreclosure, ejectment, and redemption. The limit was to be twelve years in each of these cases. On the other hand, twenty years is the corresponding period of limitation prescribed for the recovery of specialty debts generally by 3 & 4 Will. IV. c. 42, s. 3 *et seq.* To which, then, of these enactments was a specialty covenant to pay a mortgage debt subject? Did it fall within the twelve years' rule or the twenty years' rule? The C. A. pointed out that the object of the *Statutes of Limitations* was to confirm and define the judicial presumption of payment after a certain lapse of time "or such delay on the part of the creditor as entitles the debtor to believe that he will not be called upon to pay" (p. 517), and that the Legislature intended to attain this object by applying these principles both to actions at law and suits in equity. It had been contended that the effect of these words was only to limit the recovery of the money so far as it could be recovered by a sale of the land or by the receipt of the rents.

Which was applicable?

To this, Jessel, M.R., said there were two objections—(1) that it put words into the section which were not to be found there; and (2) that it gave no meaning to the words which were in the section, because you could not get the money as against the land at the time when the Act was passed except by a suit in the Court of Chancery. A further reason was that it would be absurd that you should get rid of the greater, viz. the liability of the land, and retain the less, viz. the personal liability to pay. The primary object of the Act was no doubt to bar actions for the recovery of land or for enforcing charges thereon, but this section had gone beyond that point, and barred an action on a covenant in a mortgage deed, because it was an action to recover money charged upon land.

Collateral bond.

Further, in *Fearnside* v. *Flint* (22 Ch. D. 579) the fact that the mortgage debt was secured by a collateral bond given by the mortgagor, A. B., made no difference, and the specialty debt was held barred, as in *Sutton* v. *S.*; the reason being that "no distinction can exist between a covenant contained in a mortgage deed and a collateral bond given at the same time as the mortgage." Similarly if A. B. settles his estate, payment of interest by tenant for life in pursuance of a covenant in a separate deed keeps the debt alive against the remaindermen: *Dibb* v. *Walker* ([1893] 3 Ch. 429).

Covenant by surety.

In *In re Frisby* (43 Ch. D. 106), by a mortgage deed dated 1872, A. B. and his surety (S.) jointly and severally covenanted for payment to the mortgagee (C. D.) of the debt and interest. A. B. paid interest till 1880. S. died in 1888, without ever having made any payment or given any acknowledgment. C. D. claimed against S.'s estate. It was held that the payment of interest by A. B. prevented the statute from running in favour of S. Compare *Lewin* v. *Wilson* (11 A. C. 639). But there was a difference of opinion on this further point. Bowen, L.J., following Kay, J., said: "I do not think that this section was intended to apply to personal actions under a covenant in a mortgage deed if not brought against the mortgagor or his representatives. The language of the section appears to me to point at one liability and one person, not to two liabilities existing in two different persons. Assuming, however, that the section is applicable, I am of opinion that payment of interest by the mortgagor kept the debt alive as against the surety." On the other hand, Cotton, L.J., held that sect. 8 of the Act applies to an action against the surety as well as to one against the mortgagor. Fry, L.J., was neutral. See, too, *Charter* v. *Watson* ([1899] 1 Ch. 175) where the land being irredeemable, the policy was held irredeemable, both being subject to the same proviso for redemption.

Cases where this rule does not apply.

In all these cases the rule that the mortgage debt is one and indivisible for the purposes of the Act was rigidly adhered to.

We now come to four cases which constitute real exceptions to this rule.

Covenant by surety.

(1) The principle of *In re Frisby* was held not to apply where a collateral bond had been given by a surety to secure a mortgage debt and interest: *In re Powers* (30 Ch. D. 291). The C. A. approved of the decision in *Fearnside* v. *Flint*, and said that to hold otherwise would be to give a different effect to an instrument because it was not written on the same sheet of paper: here, however, the proceedings were to enforce a different debt not charged on land, and were not between the same parties. It will be seen that *In re Powers* stands to *In re Frisby* as *Fearnside* v. *Flint* stands to *Sutton* v. *Sutton*; and it may be doubted therefore whether the distinction between *In re Powers* and *In re Frisby* can be maintained; indeed, the parallel is completed by the fact that the Lord Justices referred to payment of interest by the mortgagor as an alternative ground of decision in *In re Powers.*

Constructive payment of interest.

(2) In *In re England* ([1895] 2 Ch. 100, 820), the cases where no interest was paid nor acknowledgment made owing to the beneficiary of the estate being the beneficiary of the mortgage debt, were discussed.

In *Topham* v. *Booth* (35 Ch. D. 607), which was a case of this kind, D. was for twenty years tenant for life of the estate and mortgage debt; the remaindermen of the debt were nevertheless entitled to foreclose. *À fortiori* if D. owns the debt: *Roddam* v. *Morley* (1 D. & J.

1); ditto if husband and wife live together, and are respective tenants for life of debt and estate: *In re Dixon* ([1900] 2 Ch. 561). In *In re England* the remaindermen brought an action against covenantor's executors; but their claim was rejected on the ground that the tenant for life of the mortgage debt had been tenant in fee simple of the equity of redemption. If he had been tenant for life of the equity of redemption, it might have been said that there was a duty (which the remainderman could have enforced against his estate) to keep down the interest; and equity expects every man to do his duty. But the owner in fee simple has no such duty. Why, then, should equity assume that he keeps down the interest? The question has never before arisen except in the converse case of *Coope* v. *Cresswell* (2 Ch. 112), where it was held that payments by the person absolutely entitled to the personalty did not keep the charge alive against the realty. The debt remained, but the charge was gone. So in this case *mutatis mutandis*, the right to sue for the debt was gone, although the charge possibly (pp. 107, 826) remained. The unity of the mortgage was severed. Only one remedy survived.

In re England was followed in *In re Allen* ([1898] 2 Ch. 499), where A. B. mortgaged *x. y.*, and devised *x.* to D. for life, remainder to F.; *y.* to D. for life, remainder to G. Then (1865) the mortgage is paid out of *x.* D. dies in 1895. F. cannot recover against G.

Contracts not under seal.

(3) Again, if the contract to pay is not under seal—if there is, *e.g.*, a memorandum of deposit and a deposit, the Act of 1623 saves the debtor from his debt, although the lien is enforceable for ever and ever: *Barnes* v. *Glenton* ([1899] 1 Q. B. 885), approving *Firth* v. *Slingsby* (58 L. T. 481); *London & Midland B.* v. *Mitchell* ([1899] 2 Ch. 161); *Levy* v. *Stogdon* ([1898] 1 Ch. 487).

The clause extinguishing the title.

(4) Again, the provision of 3 & 4 Will. IV. c. 27, s. 34, which declares that when the action is barred the title is extinguished, received a striking illustration in *Sands to Thompson* (22 Ch. D. 614), and in *Kibble* v. *Fairthorne* ([1895] 1 Ch. 219). In the latter case A. B.'s debt and C. D.'s right to foreclose was barred in 1887. In 1892 A. B. conveyed the land to the use of K. L. in fee simple by way of mortgage. In 1893 A. B. acknowledged his indebtedness to C. D. Romer, J., held that before 1893 "not only was" C.D.'s "remedy against the land barred, but the charge itself was extinguished." C. D. therefore had "no right to the land." The acknowledgment by A. B. may have revived the remedy on a personal debt which was never extinguished; but sect. 34 of 3 & 4 Will. IV. c. 27, had extinguished the right and title to the land, and acknowledgment could not revive an extinct charge on land. The debt by specialty had outlived the mortgage.

The extinction of title only takes place as between A. B. and C. D. and their privies, *Dalton* v. *Fitzgerald* ([1897] 2 Ch. 86), between whom it also acts retrospectively: *In re Jolly* ([1900] 2 Ch. 616).

Acknowledgment, etc.

We append a few notes on what payment of interest or acknowledgment is requisite for the purposes of this Act.

"The underlying principle of all the Statutes of Limitations is that a payment to take a case out of the statute must be a payment by a person liable as an acknowledgment of right:" per Jessel, M.R., in *Harlock* v. *Ashberry* (19 Ch. D. 539, 545). Part payment or payment of interest has the same effect as acknowledgment: see 7 Will. IV. and 1 Vict. c. 28. This Act was discussed in *Thornton* v. *France* ([1897] 2 Q. B. 143); *Ludbrook* v. *L.* ([1901] 2 K. B. 96). Payment of rent by a tenant of the mortgagor to the mortgagee (*ib.*), payment of interest or an acknowledgment by a solicitor employed at one time by the mortgagor, *Newbould* v. *Smith* (33 Ch. D. 127; 14 A. C. 423), an acknowledgment by one of two joint mortgagees who were on the face of the deed trustees, *Richardson* v. *Younge* (6 Ch. 478), or by a co-executor-trustee against the wish of the others: *Astbury* v. *A.* ([1898] 2 Ch. 111)†, following *Fordham* v. *Wallis* (10 Ha. 217), does not bind the realty.

An acknowledgment, etc., by a co-executor keeps the contract[(a)] or specialty[(b)] debt alive, *In re Macdonald* ([1897] 2 Ch. 181)[(a)], *In re Hollingshead* (37 Ch. D. 651)[(b)], as against the personalty only.

An acknowledgment, etc., by trustees, *Toft* v. *Stephenson* (1 D. M. & G. 28); *St. John* v. *Boughton* (9 Si. 219), by transferor of part, *Chinnery* v. *Evans* (11 H. L. C. 115), but not of all, *Newbould* v. *Smith*, the estate; by tenant for life, *supra passim* (and under 3 & 4 Will. IV. c. 42; *Roddam* v. *Morley*; *Dibb* v. *Walker, supra; Pears* v. *Laing* (12 Eq. 41)), or by receiver, *Chinnery* v. *Evans*, *In re Hale* ([1899] 2 Ch. 107), keeps the mortgage alive as against the realty. Prepayment is not part payment: *In re Lord Clifden* ([1900] 1 Ch. 775).

An acknowledgment or payment must be made by the proper parties, and meant to be an admission: *Banner* v. *Berridge* (18 Ch. D. 254, 274), cited in *Friend* v. *Young* ([1897] 2 Ch. 432-37)†. In *Friend* v. *Young* part payment was discussed in relation to a current account: *Firth* v. *Slingsby* (58 L. T. 481); *Pryke* v. *Hill* (79 L. T. 738), contain instances of acknowledgment by correspondence: *secus* *Mowbray* v. *Appleby* (80 L. T. 805).

Generally.

The rule that prevailed previously to 3 & 4 Will. IV. c. 27, that no lapse of time barred the right of a mortgagor to redeem the whole where he occupied part of the mortgaged lands, was repealed by that statute: *Kinsman* v. *Rouse* (17 Ch. D. 104). The provisions in these statutes relative to persons under disability do not apply to redemption actions; *ib.; Forster* v. *Patterson* (17 Ch. D. 132). Compare *Hornsey Local Board* v. *Monarch B. Soc.* (24 Q. B. D. 1).

In a redemption action and analogous cases more than six years' interest is recoverable: *Dingle* v. *Coppen* ([1899] 1 Ch. 726, 741)†, citing *Edmunds* v. *Waugh* (1 Eq. 418); *In re Marshfield* (34 Ch. D. 721), etc.

The absence of acknowledgment or payment is fatal to the mortgagor's right to redeem against a mortgagee in possession, although the latter was originally let into possession as agent for the former: *Markwick* v. *Hardingham* (15 Ch. D. 339).

An action to recover a personal legacy is within sect. 8 of the Act of

1874, unless secured by express trust. As to when legatees can be considered *c.q.t.*, see *In re Davis* ([1891] 3 Ch. 119); *In re Barker* ([1892] 2 Ch. 491). See *ante*, p. 206.

An express trust makes no difference in case of land charges: *R. P. L. Act*, 1874, s. 10; *Williams* v. *W.* ([1900] 1 Ch. 152). (*Rochefoucauld* v. *Boustead* ([1897] 1 Ch. 208 *et seq.*) sums up the law as to proceeds of sale secured by express trust before 1888. Since 1888 these express trusts make no difference.)

Date of right of action.

As to dates when right of action accrues, see *Heath* v. *Pugh* (7 A. C. 235) (by mortgagee after foreclosing); *In re Brown's E.* ([1893] 2 Ch. 300) (against surety, payment on demand); *In re Owen* ([1894] 3 Ch. 220) (by chargee of reversion); *Hughes* v. *Cole* (27 Ch. D. 231) (annuitant); *Jarman* v. *Hale* ([1899] 1 Q. B. 994); *Lynes* v. *Snaith* ([1899] 1 Q. B. 486) (tenant at will); *In re Earl of Devon's S. E.* ([1896] 2 Ch. 562) (life tenants and appointees); *Hornsey Local Board* v. *Monarch B. Soc.* (24 Q. B. D. 1) (sanitary authority).

Pleading.

These Statutes of Limitations must be pleaded: R. S. O. (O. XIX., r. 15); C. C. R. (O. X., 14A); *Eaton* v. *Tapley* ([1899] 1 Q. B. 953).

Lâches.

Where these statutes do not apply—as in rights of testator's mortgagees against his legatees—equitable *lâches* and acquiescence apply: *Blake* v. *Gale* (32 Ch. D. 571)†. See *ante*, pp. 203, 207.

Mortgage—Priorities.

NORTHERN COUNTIES OF ENGLAND FIRE INSURANCE CO. *v.* WHIPP.

(26 Ch. D. 482.)

Principle.

A legal mortgagee may be postponed to a subsequent equitable mortgagee (1) by gross carelessness; (2) when he has assisted in a fraud which has led to the creation of a subsequent equitable estate without notice of the prior legal estate; (3) when he has entrusted the title deeds to an agent to raise money, and the estate thus created has by the misconduct of the agent been represented as being the first estate.

But the Court will not postpone the prior legal estate to the subsequent equitable estate on the ground of mere carelessness.

Summary of facts.

Crabtree, who was manager of a company, executed a legal mortgage of his freehold for £4500 to the company, delivered the title deeds to them, and received the money. The deeds were placed in the company's safe, of which Crabtree had a duplicate key. Crabtree took the deeds out of the safe, mortgaged the property to Mrs. Whipp, who had no notice of the company's mortgage, and handed over the deeds. The C. A. decided that the company was entitled to priority over Mrs. Whipp.

Loss of priority by legal mortgagee.

The principle in the l.c. was a principle of common law and law merchant as well as equity, *i.e.* "whenever one of two innocent persons must suffer by the acts of a third person he who has enabled such third person to occasion the loss must sustain it:" *Lickbarrow* v. *Mason* (2 T. R. 63); *Farquharson* v. *King* ([1901] 2 K. B. 697, 708). The special problem in the l.c. was a problem of equity; namely, what conduct in relation to the title deeds on the part of a mortgagee who has the legal estate is sufficient to postpone such mortgagee in favour of a subsequent equitable mortgagee who has obtained the title deeds without knowledge of the legal mortgagee? "The question," the Court stated, "is not what circumstances may as between two equities give priority to the one over the other, but what circumstances justify the Court in depriving a legal mortgagee of the benefit of the legal estate."

The carelessness displayed by the company in the l.c. was "mere carelessness:" "carelessness likely to injure and not to benefit the plaintiff company, and accordingly has no tendency to convict them of fraud." It was not negligence in the strict sense of the word, for "negligence" implies a duty which is neglected: compare *Johnson* v. *Credit Lyonnais Co.* (3 C. P. D. 42, 43), and men have no duty to keep title deeds (like fierce dogs and reservoirs) in safe custody; moreover, *Agra Bank* v. *Barry* (L. R. 7 H. L. 135) decided that the duty of investigating title and inquiring after deeds is not a duty which a purchaser or mortgagee owes to the possible holder of a latent title or security. The C. A., however, suggested that if in any case it could be shown that the prior legal mortgagee had undertaken any duty as to the custody of the title deeds towards any given person, had neglected that duty and had thereby injured the person to whom he owed the duty, the legal estate might be postponed by reason of the negligence. Again, there was no proof that the company had constituted Crabtree their agent with authority to raise money, but, on the contrary, the evidence went far to negative the existence of such an authority. The present case consequently did not resemble those cases in which a legal mortgagee has been postponed to a subsequent equitable incumbrancer.

Two categories of cases.

Those cases, according to the C. A., fell into two categories:—(1) "Those which relate to the conduct of the legal mortgagee in not obtaining possession of the title deeds;" and (2) "those which relate to the conduct of the legal mortgagee in giving up or not retaining the possession of the title deeds after he has obtained them. The two classes of cases will not be found to differ in the principles by which they are to be governed, but they do differ much in the kind of fraud which is to be most naturally looked for."

The first category of cases was divided into four classes, to which we will prefix a fifth:—

Legal mortgagee not obtaining possession of title deeds.

(1) "Such gross negligence as would render it unjust to deprive the prior incumbrancer of his priority," per Lindley, M.R., *Oliver* v. *Hinton* ([1899] 2 Ch. 264, 274)*, *e.g.* if a man does not ask for an abstract (*ib.*), or for the production of the title deeds (*ib.*); *Peto* v. *Hammond* (30 B. 495), or otherwise, wilfully shuts his eyes to the facts:" per James, L.J., *Ratcliffe* v. *Barnard* (6 Ch. 652). Carelessness is perhaps a more accurate word than negligence. *Dicta* referring these cases to "connivance in fraud" are overruled. Thus in *Lloyd's Banking Co.* v. *Jones* (29 Ch. D. 221) the owner of the legal estate was the trustee of a lady's marriage settlement. He made no inquiry for the title deeds, which were deposited with a bank to secure overdrafts. The bank had no notice of the settlement (though they had notice of the marriage), and were accordingly preferred to the trustee down to the date of notice of the settlement.

(2) "Where the legal mortgagee or purchaser has made no inquiry for the title deeds, and has been postponed either to a prior equitable estate, as in *Worthington* v. *Morgan* (16 Sim. 547), or to a subsequent equitable owner who used diligence in inquiring for the title deeds, as in *Clarke* v. *Palmer* (21 Ch. D. 124)."

(3) "Where the legal mortgagee has left the deeds in the hands of the mortgagor," or any other agent, *Brocklesby* v. *Temperance B. Soc.* ([1895] A. C. 173, 184), "with authority to deal with them for the purpose of raising money on security of the estate, and he has exceeded the collateral instructions given to him. In these cases the legal mortgagee has been postponed, as in *Perry-Herrick* v. *Attwood* (2 De G. & J. 21). This case was decided on the ground that, as they had left the deeds in the hands of the mortgagor for the purpose of raising money, they could not insist, as against those who in reliance on the needs lent their money, that the mortgagor had exceeded his authority." Compare *Robinson* v. *Montgomery Brewery Co.* ([1896] 2 Ch. 841). *Query:* will such purpose be presumed? Ashburner, pp. 419, 427.

(4) "Where the legal mortgagee has made inquiry for the deeds, and has received a reasonable excuse for their non-delivery, and has accordingly not lost his priority, as in *Barnett* v. *Weston* (12 Ves. 130), *Hewitt* v. *Loosemore* (9 Hare. 449), *Agra Bank* v. *Barry* (L. R. 7 H. L. 135)." Compare *Manners* v. *Mew* (29 Ch. D. 725)†. Contrast *Maxfield* v. *Burton* (17 Eq. 15), where the excuse ("they are at my bankers") was not reasonable. See *post*, p. 363.

(5) "Where the legal mortgagee has received part of the deeds

under a reasonable belief that he was receiving all, and has accordingly not lost his priority, as in *Hunt* v. *Elmes* (2 De G. F. & J. 578), *Ratcliffe* v. *Barnard* (6 Ch. 652), and *Colyer* v. *Finch* (5 H. L. C. 905)."

Legal mortgagee parting with title deeds.

The second category, *i.e.* the cases where the mortgagee having received the deeds has subsequently parted with them or suffered them to fall into the hands of the mortgagor, were divided into two classes, to which two others will be suffixed:—

(6) "Where the title deeds have been lent by the legal mortgagee to the mortgagor upon a reasonable representation made by him as to the object in borrowing them, and the legal mortgagee has retained his priority over the subsequent equities, as in *Peter* v. *Russell* or *Thatched House Case* (1 Eq. Cas. Abr. 321), *Martinez* v. *Cooper* (2 Russ. 198)."

(7) "Where the legal mortgagee has returned the deeds to the mortgagor for the express purpose of raising money on them, though with the expectation that he would disclose the existence of the prior security to any second mortgagee: *Briggs* v. *Jones* (10 Eq. 92). In such cases the Court has on the ground of authority postponed the legal to the equitable estate. This is the same in principle as the decision in *Perry-Herrick* v. *Attwood* (*ubi supra*);" and there is a similar principle of mercantile law: *Cole* v. *North Western B.* (L. R. 10 C. P. 354, 362); *Henderson* v. *Williams* ([1895] 1 Q. B. 521) (cited 1901, 2 K. B. 715–719); *secus*, where one of two executor-mortgagees acts thus without the authority of his co-executor: *In re Ingham* ([1893] 1 Ch. 352); compare *Mocatta* v. *Murgatroyd* (1 P. W. 393).

(8) "If a person permits title deeds which belong to his security to be dealt with for the purpose of creating a preferential charge of a definite amount, and the limit is exceeded, he cannot as against innocent third parties, who have advanced their money without notice of the limit, complain that the authority which he gave has been exceeded in that respect:" per Lord Macnaghten, *Brocklesby* v. *Temperance B. Soc.* ([1895] A. C. 173).

(9) Where the mortgagee leaves a reconveyance executed and with a receipt clause with his agent, who is also agent for the mortgagor, the deed is merely an escrow, and there is no gross negligence: *Lloyd's Bank* v. *Bullock* ([1896] 2 Ch. 192); compare *London Freehold Co.* v. *Suffield* ([1897] 2 Ch. 608, 621, 622). Presumably if such deed were delivered the Court would come to a different conclusion.

Equitable mortgagees, etc.

In *Nat. Prov. B. of England* v. *Jackson* (33 Ch. D. 1) the C. A. held that the principle laid down in the l.c., that a legal mortgagee will not be postponed to a subsequent equitable mortgage on the ground of mere carelessness, did not apply as between equitable claims, "as between equitable claims the question is whether one party has acted in such a way as to justify him in insisting on his equity as against the other" (p. 13). Compare *Farrand* v. *Yorkshire Banking Co.* (40 Ch. D. 182); *Taylor* v. *Russell*

([1892] A. C. 244, 262). Still it is open to question whether the "mere carelessness" which has displaced equities has not been "gross negligence" under another name; per Kay, J., S. C. ([1891] 1 Ch. 8). Omission to give notice will not postpone him in realty cases, *Union Bank* v. *Kent* (39 Ch. D. 238), any more than it will postpone a legal transferee: *Dixon* v. *Winch* ([1900] 1 Ch. 736). In *N. P. B. of E.* v. *Jackson* two ladies, whose freehold property was subject to a mortgage, were induced by their brother J. to convey their share to him for alleged valuable consideration; but no consideration passed, and the deeds were never read over to the ladies, who signed them in full reliance on J.'s statement. Next day J. deposited the deeds at the plaintiff bank as security for a loan, and the bank manager was told by J. that the ladies were not to receive any consideration, although the conveyances recited consideration money. The manager communicated with the bank's solicitor, but did not tell him that no consideration had passed, and the title was accordingly accepted. Held, by the C. A. (1) that the conveyances were voidable, and not void, and therefore passed the legal estate; compare *Heath* v. *Crealock* (10 Ch. 22), *Lloyd's Bank* v. *Bullock* ([1896] 2 Ch. 197); (2) and that the bank, owing to their manager's negligence, must have their equity postponed to that of the ladies. Similarly in *Lloyd's B.* v. *Bullock* the equity of the party giving a receipt before receiving anything was postponed to a later equity. Compare *Smith* v. *Evans* (28 B. 59) (lien); *Hunter* v. *Walters* (7 Ch. 75); *Gordon* v. *James* (30 Ch. D. 249). See (9), *supra*.

Rules (2), (3), (4), (5) apply *à fortiori* to equitable mortgages: *Dixon* v. *Muckleston* (8 Ch. 155, 161) (5); *In re Castell* ([1898] 1 Ch. 315) (2), (3); *Frazer* v. *Jones* (5 Ha. 475) (4).

Prior tempore potior jure.

Where there is no fraud or negligence or carelessness time confers priority. Thus in *Carritt* v. *Real and Personal Advance Co.*, (42 Ch. D. 263) P. purchased an equity of redemption of leaseholds, and took an assignment to his clerk, Chuck, who executed a declaration of trust in his favour. Among Chuck's duties one was to put away P.'s securities in a safe. Chuck took advantage of his position to represent himself to the defendant company as absolute owner of the property. He then executed to them an equitable charge of the equity of redemption, deposited with them the deed of assignment, and absconded. Chitty, J., decided that there was no negligence on the part of Carritt sufficient to deprive him of his prior equitable title. The case was covered by the *Shropshire Union Rys. and Canal Co.* v. *Reg.* (L. R. 7 H. L. 496). It had been suggested that a recital as to Chuck having agreed to purchase the property for a certaim sum was a misstatement, and that therefore the party authorizing the misstatement had the worst equity; but Chitty, J., said that this recital was merely common form, and meant to keep a trust off the title, not to mislead; as in *In re Harman Ry. Co.*, cited *post*, p. 365.

In *In re Richards* (45 Ch. D. 589), a solicitor having in 1883 received money for investment represented to the client that he had invested it on a specified mortgage, and had paid interest thereon, then deposited the title deeds of the mortgaged property with his own bankers to secure an overdraft. Stirling, J., decided "that, the title of both claimants being equitable, they rank according to priority of date," and that the client had not lost his priority by leaving his title deeds in the charge of his solicitor. Compare *In re Vernon* (33 Ch. D. 402); *Isaac* v. *Worstencroft* (67 L. T. 351); *Hopkins* v. *Hemsworth* ([1898] 2 Ch. 347) (sub-mortgages).

In *Turner* v. *Smith* ([1901] 1 Ch. 213) a mortgagor paid her solicitor £1500 to pay off her mortgage: he pocketed it, paid interest on the mortgage, and became for one day transferee thereof; his transferee was postponed to the mortgagor, for under the circumstances he took it as trustee for her. Byrne, J., cited and applied the following passage from *Dixon* v. *Winch* ([1900] 1 Ch. 736): "Where a mortgage is transferred without the priority of the mortgagor the transferee takes subject to the state of account between the mortgagor and mortgagee at the date of the transfer: *Matthews* v. *Wallwyn* (4 V. 118)."

Tabula in naufragio.

"A man who has *bonâ fide* paid money without notice of any other title, though at the time of the payment he as purchaser gets nothing but an equitable title, may afterwards get in a legal title if he can and may hold it, though during the interval between the payment and the getting in of the legal title he may have had notice of some prior dealing inconsistent with the good faith of the dealing with himself:" per Lord Selborne, in *Blackwood* v. *London Chartered B. of Australia* (L. R. 5 P. C. 92, 111). "There is nothing in itself inequitable in so disarranging equities:" per Lord Macnaghten, in *Taylor* v. *Russell* ([1892] A. C. 261); followed in *London, etc., Banking Co.* v. *Goddard* ([1897] 1 Ch. 642) (declaration of trust and equitable mortgage). The limits to this doctrine are that "a conspiracy between the first and third mortgagees to cheat the second cannot be right:" per Lindley, L.J., *West London Bank* v. *Reliance P. B. B. Soc.* (29 Ch. D. 963), questioning older cases. Distinguish *Atherley* v. *Burnett* (33 W. R. 779). Again, if the outstanding legal estate is a satisfied term or is vested in a bare trustee this cannot be done, *Harpham* v. *Shacklock* (19 Ch. D. 207, 214), because here the subsequent equitable mortgagee has constructive notice of the prior equity: per Jessel, M.R., *Mumford* v. *Stohwasser* (18 Eq. 562); per Fry, L.J., *Taylor* v. *Russell* ([1891] 1 Ch. 28). Far less can this be done "where the mortgagee has notice that the legal title at the time when it is so got in is held on an express "trust" for persons whose equity it is sought to displace: *Taylor* v. *London, etc., Banking Co.* ([1901] 2 Ch. 249, 256–57). Indeed, it is not certain that it can be done where the mortgagee has no such notice: per Lindley, L.J., *Bailey* v. *Barnes* ([1894] 1 Ch. 37). Supposing, however, the outstanding legal estate is held by or conveyed through a trustee for a third party who has nothing to do with the dispute about priority, the subsequent equitable mortgagee may employ the expedient and obtain the advantage stated by Lord Selborne: *Taylor* v. *Russell* ([1891] 1 Ch. 29); *Bailey* v. *Barnes* ([1894]) 1 Ch. 37).

Building society mortgagees' title to legal estate.

Where the legal estate in land has been vested in a building society as mortgagees and the society is paid off and gives the statutory receipt under the *Building Societies Act* of 1874, the legal estate is vested in the equitable mortgagee who is first in point of time unless the society is paid off by an equitable mortgagee without notice of prior incumbrances, in which case the legal estate vests in him: *Fourth City M. B. B. Soc.* v. *Williams* (14 Ch. D. 140); *Pease* v. *Jackson* (3 Ch. 576); *Robinson* v. *Trevor* (12 Q. B. D. 423); *Sangster* v. *Cochrane* (28 Ch. D. 298).

Tacking, and notice.

Being so vested in him he will be able to tack on to his legal estate any advances on the same security made by him without notice of prior equitable mortgages, *Hosking* v. *Smith* (13 A. C. 582), except in cases between 7th of August, 1874, and 1st of January, 1876: *Robinson* v. *Trevor* (*ubi supra*). After notice of a mesne incumbrance the prior mortgagee loses this right: *Hopkinson* v. *Rolt* (9 H. L. C. 514) *; *Bradford Banking Co.* v. *Briggs* (12 A. C. 29); and notice need be only given to one of several joint tenants of realty: *Freeman* v. *Laing* ([1899] 2 Ch. 355). These rules apply to further advances made in pursuance of a covenant: *West* v. *Williams* ([1899] 1 Ch. 132).

Notice in realty cases.

In mortgages of land (including leaseholds) notice does not secure priority, *In re Richards* (45 Ch. D. 589, 595 *et seq.*); *Hopkins* v. *Hemsworth* ([1898] 2 Ch. 347); *Taylor* v. *London, etc., Co.* ([1901] 2 Ch. 254, 255). The value of notice is (1) to prevent mortgagor from paying interest or principal to the wrong person, *Williams* v. *Sorrell* (4 V. 389); *Norrish* v. *Marshall* (5 Madd. 475); *In re Southampton's E.* (16 Ch. D. 178), cited in *Dixon* v. *Winch* ([1900] 1 Ch. 736); (2) to prevent tacking (*supra*).

Notice in personalty cases,

Notice to trustees of personalty (including proceeds of realty) given by an assign who has no notice of prior assignments confers priority: *Dearle* v. *Hall* (3 Rus. 1)*. As to debts, see *ante*, p. 25.

to trustees,

An incumbrancer of a trust fund who first gives notice to any of the trustees obtains priority over any prior incumbrancer who has given no notice to any of them; but the other trustees are not affected by this notice so as to render them liable for anything they may do subsequently to its receipt: *Low* v. *Bouverie* ([1891] 3 Ch. 82). Notice to one of two trustees who is alive at the date of both assignments and dies without communicating it to his co-trustee is good: *Ward* v. *Duncombe* ([1893] A. C. 369); *secus* if he dies before the date of the second assignment: *Timson* v. *Ramsbottom* (2 K. 35). Notice to all the trustees who die before the date of the second assignment is good for all purposes: *In re Wasdale* ([1899] 1 Ch. 163). Notice to a sole trustee who dies or retires after such date is useless: *Hallows* v. *Lloyd* (39 Ch. D. 686). Notice to one's self does not count: *Lloyd's Bank* v. *Pearson* ([1901] 1 Ch. 865). The decision on notice in *Freeman* v. *Laing* (*supra*) was only applicable to realty. Notices should be given by incumbrancers to trustees of a derivative instead of to trustees of an original settlement: see *Stephens* v. *Green* ([1895] 2 Ch. 148, 161)†. If the fund is in Court a stop order must be obtained; it has the effect of notice: *Mutual Life Ass. Soc.* v. *Langley* (32 Ch. D. 460); *Stephens* v. *Green*, pp. 159, 161. Income should be mentioned in the stop order: *Mack* v. *Postle* ([1894] 2 Ch. 449). See *Bath* v. *B.* ([1901] 1 Ch. 460).

by stop order,

of *lis pendens*,

Registration of a *lis pendens* is not notice, as the doctrine of *lis pendens* applies only to realty: *Wigram* v. *Buckley* ([1894] 3 Ch. 483). These principles apply to an assignment to the trustee in bankruptcy, *In re Beall* ([1899] 1 Q. B. 688), citing *Mercer* v. *Vans Colina* (67 L. J. Q. B. 424), and do not apply to Companies, *Société G. de Paris* v. *Tramways Union Co.* (14 Q. B. D. 424), nor to chattels, nor to negotiable instruments, etc., *Bence* v. *Shearman* ([1898] 2 Ch. 582), which are governed by law merchant or statute respectively.

aliunde.

Notice may be *aliunde*, but the recipient's attention should be brought to it: *Lloyd* v. *Banks* (3 Ch. 488); *Bence* v. *Shearman* (*supra*).

Summary of rules as to notice.

From the above list of cases three maxims emerge: clear definite notice must be given (1) to the trustees for assignor; (2) if more than one, to all of them; (3) if one, in writing. Otherwise the secret may die with them or him, and the party giving notice will be accused of negligence and his claim will be postponed.

Consolidation of Mortgages.

JENNINGS *v.* JORDAN.

(6 App. Cas. 698.)

Principle.

The Court leans against the extension of the doctrine of the consolidation of mortgages.

Summary of facts.

T. Tale mortgaged Blackacre to Merrit; then settled the equity of redemption of a part thereof on his daughter on her marriage. He then mortgaged Whiteacre to J. Tale. The two mortgages became vested in Jennings. The House of Lords held that Jennings had no right to consolidate the two mortgages as against the persons entitled under the settlement.

Statement of the principle of consolidation.

"A mortgagee, who holds several distinct mortgages under the same mortgagor, redeemable, not by express contract, but only by virtue of the right which (in English jurisprudence) is called 'equity of redemption,' may within certain limits, and against certain persons (entitled to redeem all or some of them), 'consolidate' them, that is, treat them as one, and decline to be redeemed as to any, unless he is redeemed as to all:" per Lord Selborne, l.c., p. 700.

Reason for the rule.

The reason for the rule is that equity acts *in personam*, and a Court of Equity will not assist a mortgagor in getting back one of his estates unless he pays all that is due, though secured on a different estate. The mortgagor is coming into a Court of Equity to obtain its assistance in getting back an estate which at law belongs to the mortgagee, and it is held inequitable to allow him to get back an estate of more value than the debt charged on it, and to leave the mortgagee with an estate charged with a debt due by the mortgagor which may be of larger amount than the value of the estate.

The Court since this decision, which overruled *Tassell* v. *Smith* (2 De G. & J. 713) and practically overruled *Beevor* v. *Luck* (4 Eq. 537), see ([1896] A. C. 196), has refused to extend the doctrine of consolidation, and the high-water mark of the doctrine is at the present day represented by *Vint* v. *Padget*. See below.

In the following cases the reader must assume that proper notice of incumbrances was given to subsequent purchasers and mortgagees, etc.:—

Cases of consolidation.

(*a*) A. B. mortgages *v.* to C. D., and *x. y. z.* to C. D.; after that A. B. cannot, nor can E. F., a subsequent assign by way of purchase or of mortgage, etc., from A. B., redeem *x. y. z.* without redeeming *v.*

(*b*) A. B. mortgages *v.* to K. L., and *x. y. z.* to M. N.; then K. L. and M. N. transfer their mortgages to C. D.; after that, etc., as in (*a*): *Marsh* v. *Lee*, White & Tudor's L. C., ii. 107; *ditto* if E. F. is purchaser of *v.* only, *Jennings* v. *Jordan*, citing *Ireson* v. *Denn* (2 Cox, 425), etc.

(*c*) A. B. mortgages *v.* to K. L., and *x. y. z.* to M. N.; then conveys *v.*, *x. y. z.* to E. F.; then K. L. and M. N. transfer their mortgages to C. D.; after that, etc., as in (*a*). *Vint* v. *Padget* (2 D. & J. 611), as cited in *Pledge* v. *White* ([1896] A. C. 187)*; *Tweedale* v. *T.* (23 B. 341).

(*d*) A. B. mortgages (1) *x. y. z.* equitably to K. L.; then (2) *s. t.* to K. L.; then (3) *v.* and (4) *s. t.* to C. D. C. D. under his power of sale sells *s. t.* and pays off (1) and (2). A. B. becomes bankrupt, and E. F. is his trustee in bankruptcy. E. F. may not redeem *x. y. z.* nor *v.* without paying (3) and (4): *Cracknall* v. *Janson* (11 Ch. D. 1).

(*e*) A. B. mortgages (1) *v.*, *x. y. z.* to G. H., then (2) *v.* to E. F., then (3) *x. y. z.* to C. D. (without notice of E. F.). C. D. pays off G. H. and tacks (3) to (1). E. F. may not redeem *v.* without paying (1) and (3): *Atherley* v. *Burnett* (33 W. R. 779); *Bovey* v. *Skipwith* (1 Ch. Ca. 201); *Titley* v. *Davies* (2 Y. & C. C. C., 399); where tacking does not, marshalling does, take place. See *post*, p. 287 (11), (12), (13).

(*f*) A. B. mortgages *x. y. z.* to C. D., *v.* to K. L.; then becomes bankrupt, E. F. being his trustee in bankruptcy; then K. L. assigns to C. D.: after that, etc., as in (*a*): *Selby* v. *Pomfret* (1 J. & H. 336), as cited in *Pledge* v. *White*, p. 194.

(*g*) A. B. mortgages *x. y. z.* to G. H., and *v.* to K. L., M. N., etc.; then mortgages *v.*, *x. y. z.* to C. D. and F. E., who in 1885 assign to E. F.; between 1871 and 1890, C. D. becomes assign of G. H., K. L., M. N., etc.; after that, etc., as in (*c*): *Pledge* v. *White* (*ubi supra*).

(*h*) A. B. mortgages *v.* to C. D., then *v.* to E. F., then *x. y. z.* to E. F., then *x. y. z.* to C. D., E. F. postponing his charge on *x. y. z.* to C. D.'s charge. (A. B.'s mortgages to C. D. give an unlimited power to consolidate.) Then as in (*a*): *Andrews* v. *City P. B. B. Soc.* (44 L. T. 641). Omit part in brackets and the same result seems to follow. See (*c*).

Cases of no consolidation.

(*i*) If A. B. is not in default or can rely on common law as regards *x. y. z.*, then there is no consolidation: *Cummins* v. *Fletcher* (14 Ch. D. 699); *Crickmore* v. *Freeston* (40 L. J., Ch. 137).

(*j*) A. B. mortgages *v.* for a private debt to C. D.; then A. B. and his partners O. P. and Q. R. mortgage *x. y. z.* for a partnership debt to C. D.; after that *semble*, that A. B. and his assigns can redeem *x. y. z.* without redeeming *v.*; *Cummins* v. *Fletcher* (14 Ch. D. 699, 710), disapproving *Beevor* v. *Luck* (4 Eq. 537).

(*k*) A. B. and his partner Q. R. mortgage *v.* for a partnership debt to C. D., then, etc.; after that, etc., as in (*j*): *In re Raggett, Ex parte Williams* (16 Ch. D. 117).

(*l*) If *v.* is leasehold or life-interest, and the lease or life ends before consolidation is claimed, there is no consolidation: *ib.*, *In re Gregson* (36 Ch. D. 226).

(*m*) A. B. mortgages (1) *x. y. z.* to C. D. and G. H. jointly; then (2) *v.*, *x. y. z.* to C. D.; after that A. B. can redeem (2) without redeeming (1): *Riley* v. *Hall* (79 L. T. 244).

(*n*) A. B. executes a voluntary settlement of *x. y. z.* to E. F.; then (under 27 Eliz. c. 4) mortgages *x. y. z.* to C. D.; then mortgages *v.* to C. D.; after that E. F. may redeem *x. y. z.* without redeeming *v.*, *In re Walhampton Estate* (26 Ch. D. 391); (after which C. D. loses his rights of consolidation as against A. B.: *Jennings* v. *Jordan*, pp. 703 *et seq.*).

(*o*) A. B. mortgages *x. y. z.* to C. D.; [then or previously mortgages *s. t.* to G. H.]; then conveys *x.* to E. F. for value; then mortgages *v.* to C. D.; [then *s. t.* is transferred to C. D.]; after that E. F. can redeem *x. y. z.* without redeeming *v.*: *Jennings* v. *Jordan.* As to *s. t. quære*, *ib.* pp. 716–19, but see (*p.*), (*s*).

(*p*) A. B. mortgages *v.* to C. D.; then mortgages *x. y. z.* by demise to G. H.; then mortgages *x. y. z.* in fee to E. F.; then G. H. assigns his mortgage to C. D.: after that, etc., as in (*n*): *Harter* v. *Colman* (19 Ch. D. 630), not following *Beevor* v. *Luck.* See (*e*). Contrast (*c*).

The mortgage to E. F. was really of *y.*, *s. t.*; but the judgment justifies the above statement. See *Pledge* v. *White* ([1896] A. C. 195, 196).

(*q*) A person who owns *v.* subject to a mortgage to G. H. mortgages *x. y. z.* to C. D.; then devises *v.* to A. B., and *x. y. z.* to E. F.; then C. D. becomes the assign of G. H.; after that, etc., as in (*n*): *White* v. *Hillacre* (3 Y. & C. Ex. 597), as cited in *Harter* v. *Colman.*

(*r*) A. B. mortgages *x. y. z.* to G. H.; then mortgages *x. y. z.* to E. F.; then mortgages *v.* to C. D.; then G. H. transfers his mortgage on *x. y. z.* to C. D.; after that, etc., as in (*n*): *Baker* v. *Gray* (1 Ch. D. 491).

(*s*) A. B. mortgages *x. y. z.* to G. H.; then mortgages *x. y. z.* to K. L.; then mortgages *v.* to M. N., who transfers his mortgage to C. D.; then G. H. transfers his mortgage on *x. y. z.* to C. D.; then A. B. mortgages *v.*, *x. y. z.* to E. F.; [then mortgages *v.*, *x. y. z.* to O. P.]; then K. L. [assigns his mortgage to O. P., who] under his power of sale conveys *x. y. z.* to E. F.; after that as in (*n*) (K. L.'s [or O. P.'s] title not having merged): *Minter* v. *Carr* ([1894] 3 Ch. 498).

Fry, J.'s, statement of principle.

It will be seen that the *quære* in (*o*) has been set at rest by the subsequent decisions. In *Harter* v. *Colman*, Fry, J., said: "My decision rests on this—the purchaser of an equity of redemption from the mortgagor takes it subject to all the equities which affected it in the hands of the assignor at the time of the assignment, but not to any equities subsequently arising. The equity to consolidate, arising from a subsequent union in the same person of that mortgage with another, is not an equity which was then subsisting, and therefore it is not one of the equities subject to which the equity of redemption was purchased."

To what property it applies.

Consolidation is inapplicable to a bill of sale: *Chesworth* v. *Hunt* (5 C. P. D. 266). The doctrine of election has no place with regard to it: *Griffith* v. *Pound* (45 Ch. D. 553). Subject to the above, the doctrine of consolidation of mortgages applies to legal or equitable, to real and personal property, and in an action whether for foreclosure or redemption: Coote on Mortgages, 5th ed. p. 902 *et seq.*

Conveyancing Act, 1881, s. 17.

Sect. 17 of the *C. Act*, 1881, provides that (1) a mortgagor seeking to redeem any one mortgage, shall, by virtue of this Act, be entitled to do so, without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem. (2) This section applies only if and as far as a contrary intention is not expressed in the mortgage deeds *or one of them.* And (3) if the deeds are or one of them is dated after this Act. The effect of this section is that in the absence of a contract to exclude the Act there will be no consolidation. The usual practice is to insert a clause excluding the application of this section of the *C. Act; Bird* v. *Wenn* (33 Ch. D. 215, 217).

Suretyship.

For the effect of an express contract to consolidate by a principal debtor in discharging a surety from his debt and mortgage, see p. 293 (36).

Ashburner Mortgages, etc., pp. 290–94; Fisher, § 1210–25. Robbins, pp. 855 *et seq.*

Mortgage of Chattels.

Ex parte **ODELL**: *In re* **WALDEN.**

(10 Ch. D. 76.)

Principle.

The Court regards the substance of a transaction, and if though in form a sale it is in reality a mortgage, it will be treated as a mortgage.

Summary of facts.

Cochrane advanced Walden £150 in order (*inter alia*) to pay out an execution, and upon the same day two documents were executed, one an inventory of the furniture in Walden's house, at the foot of which was a receipt for £150 for the "absolute" sale to Cochrane "of the above-mentioned articles;" the other was an agreement in writing, by which Cochrane let Walden the same furniture for two months for £170, to be repaid on 18th of September, or such other time as might be agreed upon; and power was given to Cochrane in case the £170 was not repaid and in other certain specified events to determine the agreement and take possession of the goods, sell them, and pay the surplus (if any) to Walden, who on the other hand was to make good any deficiency. On payment of the £170, together with costs, charges, and expenses payable under the agreement, the goods were to become the property of Walden. Held, by the C. A., that the two documents constituted a mortgage and required registration as a bill of sale.

Bills of sale are mortgages of chattels.

Bills of sale are now described by the *Bills of Sale Acts*, 1878 and 1882, but chiefly by sect. 4 of the Act of 1878. This section defines chattels as things "capable of complete transfer by delivery," *i.e.* at the date of the bill of sale, *Thomas* v. *Kelly* (13 A. C. 506, 518), but instead of defining enumerates particular bills of sales. This catalogue has not extended the scope of 17 & 18 Vict. c. 36, s. 1, under which *Ex p. Odell* was decided. The Act of 1878 specifies certain documents, such as "inventories of goods with receipt thereto attached," "receipts for purchase moneys;" but in order that these may be within the Act of 1878, they must be intended to take effect as assurances or transfers of chattels: *Charlesworth* v. *Mills* ([1892] A. C. 231, 241)*. These Acts also include "declarations of trust without transfer," "licences to take possession as security for any debt," agreements "by which a right in equity to any personal chattels or to any charge or security thereon shall be conferred," and excludes mercantile documents, debentures, creditors' trust deeds, ante-nuptial settlements, etc. Case-law confines these bills of sale to documents, which, by their language, pass the ownership of or the right to possess chattels. Symbols of chattels, and mere evidences of the terms on which I hand chattels over to you, are not bills of sale.

The Act of 1882 applies to bills of sale given as security for money, and avoids all such as are unregistered and informal, and also partially avoids the same when incorrect or incomplete. The question, then, which we propose to consider may be regarded as identical under whichever of these Acts it arose, and may be stated thus: What are assurances, transfers, or equitable assignments of chattels by way of security for debt?—briefly, what are mortgages of chattels?

More documents than one.

The l.c., following *Cochrane* v. *Matthews* (cited 10 Ch. D., p. 80, n.), assumed that it was immaterial whether the writing in question was contained in one or more documents. "What we have got here," said the C. A. in *Ex p. Odell* (p. 85), "is the evidence of two contemporaneous documents, both executed as part and parcel of the same transaction, as much contemporaneous as it is possible for two documents to be, and these two documents together constitute the real transaction between the parties. . . . The form adopted, a sale and a demise, seems to be wholly immaterial. . . . You cannot defeat the operation of the *Bills of Sale Act* by putting part of the transaction in one document and the other part in another document. Both documents should have been registered as a bill of sale. Together they constitute a bill of sale with a defeazance."

Severance of provisions in one document.

Conversely an agreement may be severed so as to be void as to one part of it under the *Bills of Sale Acts*, 1878 and 1882, and valid as to another part: *e.g.* an assignment of a piano and a hire purchase agreement, *Ex p. Mason* ([1895] 1 Q. B. 333), following *dicta* in *Cochrane* v. *Entwhistle* (25 Q. B. D. 116); but an assignment of fixed along with moveable machinery is not so severable: *Small* v. *Nat. Prov. B. of England* ([1894] 1 Ch. 686).

Cases on

In *Ex p. Odell* there was "no evidence of any agreement or internal evidence

arrangement between the parties apart from the documents upon which the question arises:" per Thesiger, L.J.

And the same observation applies to the following cases:—

(express exceptions)

(1) All assignments for creditors and the like, *Hadley* v. *Beedom* ([1895] 1 Q. B. 646); ante-nuptial articles and the like, *Wenman* v. *Lyon* ([1891] 2 Q. B. 192); the debentures, mortgages, and charges of any incorporated joint stock company, *In re Standard Manufacturing Co.* ([1891] 1 Ch. 627)*; *Richards* v. *Kidderminster Overseers* ([1896] 2 Ch. 212); but not of a provident and industrial society, *G. N. Ry. Co.* v. *Coal Co-operative Soc.* ([1896] 1 Ch. 187), are excepted from these Acts.

(distress)

(2) "Distresses for rent not reserved to secure some other debt" or "being a common form in a mining lease" are excepted: *In re Roundwood Colliery Co.* ([1897] 1 Ch. 373, 390, 391, 395), applying *In re Willis* (21 Q. B. D. 384), distinguishing *Pullbrook* v. *Ashby* (56 L. J. Q. B. 376); *Stevens* v. *Marston* (60 L. J. Q. B. 192).

(fixtures)

(3) A power to sell fixtures as part of the land, *In re Yates* (38 Ch. D. 112), *In re Brooke* ([1894] 2 Ch. 600), *i.e.* not separately as in *Climpson* v. *Coles* (23 Q. B. D. 465)†, an assignment of the benefit of a hire-purchase agreement, *Ex p. Rawlings* (22 Q. B. D. 193) is not a bill of sale (see *supra*, *Ex p. Mason*, *Small* v. *N. P. B. of E.*), nor is the equitable deposit of a bill of sale: *Ex p. Turquand* (14 Q. B. D. 636).

(plant)

(4) A power to seize or sell separable plant inseparably from the freehold is a bill of sale in a mortgage: *Church* v. *Sage* (67 L. T. 800); but not in a building agreement, *Ex p. Newitt* (16 Ch. D. 522); *post* (20).

(hire-purchase)

(5) A hire-purchase agreement is not a bill of sale, although it contains (*inter alia*) a power for the lender to sell the chattels, and after retaining the instalments still due to pay over the balance to the lessee: *McEntire* v. *Crossley* ([1895] A.C. 457). Here there was also a power to resume possession of the chattels.

(lien).

(6) An agreement for sale approved by the Court, reserving a vendor's lien on chattels, is a bill of sale: *Coburn* v. *Collins* (35 Ch. D. 373); but see *Ex p. Slater* (64 L. T. 426).

External evidence.

But in the following cases conclusions from extrinsic evidence were the most important factor in the *ratio decidendi.* The ordinary rule as to evidence, which is that where an agreement is reduced to writing parol evidence of its terms is inadmissible, applies: *Ex p. Parsons* (16 Q. B. D. 532, 542); *Morris* v. *Delobbel-Flipo* ([1892] 2 Ch. 352, 355), but with a qualification which was thus expressed by Kay, L.J., in *Madell* v. *Thomas* ([1891] 1 Q. B. 237): "Here we have to deal with a particular Act of Parliament, the object of which could not be carried out unless it could be shown by external evidence that the document in question was really only given as a security for money, and which must therefore have intended that this might be done." But the Courts have always claimed a power to examine whether what looks like a complete valid contract is not after all one term in a larger void contract (see *Jervis* v. *Berridge*, cited *post*, p. 339); and in those cases "where it was sought to show that an assignment which purported to be absolute was really intended to be a mortgage external evidence has been admitted for that purpose, but on the ground that the Court had power to rectify the instrument, and that it would be a fraud to insist on the absolute form of the instrument if it were only intended to be a security for money:" per Kay, L.J. ([1891] 1 Q. B. 237). See *In re Duke of Marlborough* ([1894] 2 Ch. 133) and cases cited *ante*, p. 27.

The following are bills of sale:—

Cases on external evidence; hire-purchase = mortgage.

(7) A. B. delivers chattels to C. D., and hires them from C. D. on a hire-purchase agreement. The intention, evidenced by letters, etc., was to create security for a loan, although formally the transaction was a sale followed by hiring: *In re Watson* (25 Q. B. D. 27), reviewing *In re Yarrow* (61 L. T. 642), *Redhead* v. *Westwood* (59 L. T. 293); *Gapp* v. *Bond* (19 Q. B. D. 200); *Ex p. Odell*, etc.

(8) A. B. assigns chattels absolutely to C. D. for a debt due, *plus* a further advance (total £200). On the same day he hires the chattels from C. D. on a hire-purchase agreement, the payments being spread over two years, and amounting to £200. A jury held on evidence produced *aliunde* that the parties really meant to effect a loan: *Madell* v. *Thomas* ([1891] 1 Q. B. 230).

(9) A. B. agrees that C. D. shall buy in his chattels at a sale on a friendly distress, and requests in writing that they shall be so sold. At this date there was, according to external evidence, an understanding amounting to a trust that C. D. should let, and next day he let the goods to A. B. on a hire-purchase agreement: *Beckett* v. *Tower Assets Co.* ([1891] 1 Q. B. 638); *Mellor's T.* v. *Maas* ([1901] W. N. 214).

10. A. B.'s goods are seized by his landlord's broker and sold within five days (consequently with A. B.'s permission) to C. D., who let them to A. B.'s wife: *French* v. *Bombernard* (60 L. T. 48).

In the above cases property or possession or both passed by one document or documents read as one. And the transaction was a loan. "There was no transaction outside the documents which affected in law or in equity the rights of the parties, or amounted to an assurance:" per Bowen, L.J. (35 Ch. D. 211).

No mortgage in case of,

The following cases are not bills of sale because property or possession changed independently of any document, although the document might be necessary evidence to show the conditions subject to which property or possession had changed.

The following are not bills of sale:—

hire-purchase,

(11) A company being advised of its inability to borrow, sold rolling-stock and hired it on a hire-purchase agreement: *Yorkshire Ry. Waggon Co.* v. *Maclure* (21 Ch. D. 309).

(12) A company (A. B.) is entitled to waggons contingently on paying instalments under a hire-purchase agreement to E. F. C. D., at A. B.'s request, pays the remaining instalments to E. F., and by writing A. B. assigns the chattels to C. D., and C. D. lets them to

A. B. on a hire-purchase agreement. There is evidence that these transactions form one transaction, that A. B. desired a loan in order (*inter alia*) to pay the instalments to E. F., and had no borrowing powers. These writings did not effect a loan by C. D. to A. B. on the security of their waggons, and were not a bill of sale: *Manchester, Sheffield, etc., Ry. Co.* v. *North Central Waggon Co.* (13 A. C. 554). *Semble*, if A. B. had been absolutely entitled to the waggons, and E. F. had not existed, the result would have been the same (*ib.* p. 569).

auctioneers' and sheriffs' sales,

(13) A. B.'s chattels are sold under a *fi. fa.* to C. D., and an inventory and receipt are given to C. D., and C. D. allows A. B. to remain in possession and paint pictures for him: *Marsden* v. *Meadows* (7 Q. B. D. 80).

(14) Sheriffs' and auctioneers' sales are outside these Acts because possession is given up or taken—not under any document, but by virtue of *traditio*: *Woodgate* v. *Godfrey* (5 Exch. D. 26), distinguishing *Ex p. Cooper* (10 Ch. D. 313); *Jones* v. *Tower Furnishing Co.* (61 L. T. 84).

(15) A. B.'s goods are seized under a *fi. fa.* by the sheriff, who puts in E. F. C. D., at A. B.'s request, pays out the sheriff, and requests E. F. to continue in possession as agent for C. D. A. B. by writing empowers C. D. to sell the property, pay himself, and hand over the balance to A. B. This was no bill of sale, as the property did not change hands by virtue of the writing: *Charlesworth* v. *Mills* ([1892] A. C. 231). What constitutes change of possession between husband and wife was decided in *Ramsay* v. *Margrett* ([1894] 2 Q. B. 18).

pledges,

(16) Pledges by dock-warrants or pawn-tickets are outside these Acts, because possession changes by physical means: *Ex p. Close* (14 Q. B. D. 391); *Attenborough's Case* (28 Ch. D. 682). Bearer bonds may be pledged; but probably share-certificates can only be mortgaged: *Harrold* v. *Plenty* ([1901] 2 Ch. 314), and cases on p. 240. Title deeds to realty can neither be pledged nor mortgaged: *In re Richardson* (30 Ch. D. 396).

(17) A. B. applies to C. D. for a loan and obtains it, and signs and hands to a warehouseman an order to deliver A. B.'s goods to C. D. This is a pledge, and the document, though unregistered, is good: *Grigg* v. *National Guardian Ass. Co.* ([1891] 3 Ch. 206).

(18) A. B. deposits goods by way of security for debt, and accompanies the deposit by an agreement with power of sale for the purpose of repaying the money lent. This is a pledge, and the document is only meant as evidence of the pledge, and does not transfer the goods, and is therefore, though not registered, valid: *Ex p. Hubbard* (17 Q. B. D. 690). Compare *Newlove* v. *Shrewsbury* (21 Q. B. D. 41).

(19) A. B. agrees in writing that C. D., who is his agent, should retain any goods of A. B. as security for advances. This is a pledge, and the document is good: *Morris* v. *Delobbel-Flipo* ([1892] 2 Ch. 352).

agency cases.

(20) C. D. agrees with his building lessee, A. B., that bricks brought on to C. D.'s land by A. B. should be held by A. B. as agent for C. D.: *Reeves* v. *Barlow* (12 Q. B. D. 436)†. See *supra*, (4).

It is obvious that all these cases are a mere revival under another form and in regard to other issues of the cases summed up in Coote on Mortgages, 5th ed. vol. i. p. 22, as follows:—"The rule of law is that, *primâ facie*, an absolute conveyance containing nothing to show the relation of debtor and creditor does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to re-purchase. In every case the question is, what, upon a fair construction, is the meaning of the instruments, and the absolute conveyance will be turned into a mortgage if the real intention was that the estate should be held as a security for the money."

Parallel between these cases and the older cases on "once a mortgage always a mortgage."

Indeed, the new statute law seems to have afforded a new opportunity to the old equity to assert its principle "once a mortgage always a mortgage." True, distinctions have been introduced with regard to mortgages of chattels; but they are either distinctions of detail of not much more weight than those distinctions of detail with regard to company cases and reversionary interests which are noticed on p. 240, or distinctions of mere form. The curious cast-iron formalism of the new contract is infinitely more stringent than the mild compulsion which equity introduced two centuries ago into the old contract of mortgage. And a curious parallel and contrast is afforded by cases like that of *Edwards* v. *Marcus* ([1894] 1 Q. B. 587), where both the old and new insistence on essential attributes was enough to vitiate the mortgage, but in a different way. In that case A. and B. assigned by bill of sale chattels to secure a debt with (simple) interest. On the same day B. assigned reversionary personalty to secure what was held to be the same sum with compound interest. It was held that the bill of sale did not state the condition of defeasance truly, and therefore was void. Had the bill of sale been a valid mortgage, the second and not the first document would have been bad as a clog on redemption, class (6) *infra*. Compare *Linfoot* v. *Pockett* ([1895] 2 Ch. 835).

Clogging redemption.

Clogs on Redemption.

SALT *v.* MARQUESS OF NORTHAMPTON.

(45 Ch. D. 190.)
([1892] A. C. 1.)

If the substance of a transaction is a mortgage the Court disallows any conditions appropriate to a sale but inappropriate to a mortgage.

Principle.

The trustees of an insurance company advanced to Earl Compton the sum of £10,000 on the security of a

Summary of facts.

charge on certain Scotch real estates to which he was entitled in the event of his surviving his father, who was the plaintiff in the present action. In accordance with the contract between the parties the insurance company had already insured the life of Earl Compton against the life of his father in their own office for £34,500. Nothing was ever paid by Earl Compton in respect of interest, premium, or principal. All premiums were provided by the office itself, and the reversion was charged with principal, premiums, and compound interest on the principal and premiums. A supplementary agreement was entered into on the same day as the original contract, which stipulated that in the event of Earl Compton predeceasing his father without having paid all principal money, interest, and costs due to the trustees, the proceeds of the policy should belong to the society absolutely. Earl Compton died in the lifetime of his father, intestate. The father took out administration to his estate, and claimed the right to redeem the £34,500. The House of Lords decided that he was so entitled, as the subsequent agreement was an agreement limiting the mortgagor's right of redemption to his lifetime, and therefore invalid.

Clogs classified as (1) usurious, (2) collateral advantages,

Clogs on redemption were void in equity (1) if usurious: this class was abolished when compound interest was allowed, *Clarkson* v. *Henderson* (14 Ch. D. 348); *Nat. Bank of Australasia* v. *United Hand-in-Hand Co.* (4 A. C. 391), l.c., but see *ante*, p. 76; (2) if collateral advantages, but this class is now abolished: *Santley* v. *Wilde* ([1899] 2 Ch. 474, 478), per Romer, L.J. Thus the mortgagee may stipulate for part rent or profits (*ib.*); for "tying" a public-house, *Biggs* v. *Hoddinott* ([1898] 2 Ch. 307); for being employed or for commission if unemployed, *Carritt* v. *Bradley* ([1901] 2 K. B. 550); for commission for services, etc.: *The Benwell Tower* (72 L. T. 664). The dictum in *French* v. *Baron* (2 Atk. 120), and Kay, J.'s dictum that he could not contract for reward for services: *Field* v. *Hopkins* (44 Ch. D. 530), is no longer law.

(3) fraudulent, (4) due to undue influence,

Clogs are void (3) if part of a crime or fraud, *James* v. *Kerr* (40 Ch. D. 449); (4) if imposed by constructive undue influence, *Thornhill* v. *Evans* (2 Atk. 330); *Cowdry* v. *Day* (1 Giff. 316); *Langstaffe* v.

Fenwick (10 V. 405); see pp. 76, *et seq.*; (5) if claimed as mortgagees' expenses, *ib.*; *Matthison* v. *Clarke* (3 Dr. 3); *Leith* v. *Irvine* (1 M. & K. 277)†, cited *ante*, pp. 231, 232.

(5) expenses,

(6) If penalty not forfeiture, *ante*, pp. 64, 65 (1)–(7). That is to say, clogs are void not because they are clogs, but because they are something else. Clogs are also void (7) as "repugnant conditions:" per Lindley, L.J. ([1899] 2 Ch. 475). These are clogs proper, and may be described thus:—

(6) penalties,

(7) repugnant.

A mortgage is a form of property in which mortgagor and mortgagee take certain mutually balanced interests. Mortgagee cannot cut down mortgagor's interest into an interest for years, life, lives, or tail male: *Howard* v. *Harris* (W. & T. L. C. ii. p. 11). Transmissibility and redeemability are incidents of this kind of property, and are not matters of contract, except in two senses: (1) These incidents are expressed in contractual language, but that is the fault of language; the contractual language is pure fiction. (2) Contract may postpone redemption for five, *Biggs* v. *Hoddinott*, *supra*, or possibly seven years, *Teevan* v. *Smith* (20 Ch. D. 729), or may add "collateral advantages." Contract may vary, but cannot prevent redemption. A terminable irredeemable mortgage is as much a contradiction in terms as an unassignable undescendable fee simple, or carnivorous cow. What then prevents redemption?

Covenants in a mortgage (*a*) not to redeem, *East India Co.* v. *Atkins* (1 Com. 348); (*b*) retaining benefits, *e.g.* tying a public-house after redemption, *Rice* v. *Noakes* ([1900] 2 Ch. 445); (*c*) to sell *y.* for £16,000 to the mortgagee as the condition of redeeming *x.* for £16,000, *Jennings* v. *Ward* (2 Vern. 520); (*d*) to sell to the mortgagee the right to redeem, *Price* v. *Perrie* (Free. Ch. Ca. ed. 2, 258); *Willett* v. *Winnell* (1 Vern. 488), distinguish *Lisle* v. *Reeve* ([1901] W. N. 223), are repugnant, and therefore void.

Such covenants indicate that a sale and not a mortgage is intended, and a deed cannot be construed as something between and betwixt the two. It must be sale or mortgage. Many deeds lie on the borderline which divides sale from mortgage. Some of these deeds are construed as sales subject to options to repurchase at a given price on a given day: *Tasburgh* v. *Echlin* (2 Bro. P. C. 265); *Williams* v. *Owen* (5 M. & C. 303); *Davis* v. *Thomas* (1 R. & M. 506); *Mellor* v. *Lees* (2 Atk. 494); *Barrell* v. *Sabine* (1 Vern. 268); *Endsworth* v. *Griffiths* (15 V. 468); *Alderson* v. *White* (2 D. & J. 97); and see *Goodman* v. *Grierson* (2 Ba. & B. 274); *Bonham* v. *Newcombe* (1 Vern. 214) (family arrangements), in which case the date means everything, is the essence of a contract. Others when their substance (and not their form merely) is looked at prove to be that fictitious sale subject to an option to redeem at a given price on a given day which equity calls mortgage: *Cranstown* v. *Johnston* (3 V. 170); *Vernon* v. *Bethell* (2 Ed. 110); *Bulwer* v. *Astley* (1 Ph. 422); *Croft* v. *Powell* (2 Com. 603); *Fulthrope* v. *Foster* (1 Vern. 476); *Bell* v. *Carter* (17 B. 11). As to bills of sale see last chapter, as to insurance policies see the l.c. (p. 16), citing *Drysdale* v. *Piggott* (8 D. M. & G. 546); *Bruce* v. *Garden* (5 Ch. 32), etc., in which case the date (when once passed) means literally nothing. The proviso is construed in opposite ways according as redemption or repurchase is intended. For this reason the deed must be a sale or a mortgage; it cannot be a cross between the two. In the last two cases the word redemption was not used. Often external evidence tilts the balance one way or the other, *supra*, pp. 262 *et seq.* In the l.c. external evidence was absent; and the "general intention" of the documents decided their character. Was there an "intention that the policy should be effected for the creditor's protection only, and for his sole benefit, subject to an option for the debtor to make it his own in the event (not anticipated) of his paying off the debt in his lifetime?" If so it was a sale, and when the date for purchase was once past Earl Compton's representatives could not purchase. Or was there "an intention that it should belong to the debtor subject to the security for the purpose of which it was effected?" If so it was a mortgage, and when the date for redemption was once past Earl Compton's representatives could redeem. The latter construction was adopted chiefly in consequence of the supplementary agreement.

Merger of Charges.

ADAMS *v.* ANGELL.

(5 Ch. D. 634.)

The question whether a charge which is paid off is merged depends on the intention of the payer whether expressed or implied from the circumstances attending the transaction; and the Court will presume that it is his intention to keep the charge alive if it is obviously for his benefit.

Summary of facts.

Angell mortgaged property first to Adams and then to Newsom. Adams obtained judgment for foreclosure against Angell and Newsom. Then Angell's trustee in bankruptcy, in consideration of £1380 retained by Adams "in full satisfaction of his debt," and of £20 paid to the trustee, assigned the mortgaged property to Adams, "subject to the aforesaid claim" of Newsom. It appeared that the amount due to Adams was the full value of the property. The C. A. decided that the surrounding circumstances showed an intention to keep Adams' mortgage alive as against Newsom, and that therefore it did not merge.

Equitable doctrine of non-merger:

An owner who "has paid off a prior incumbrance can never set it up as against his own mortgage:" per Chitty, J., *Platt* v. *Mendel* (27 Ch. D. 251); *Johnson* v. *Webster* (4 D. M. & G. 488). Further, if an owner creates and pays off a mortgage, the mortgage "merges" in the owner's estate: *Otter* v. *Vaux* (6 D. M. & G. 643); distinguish *Bell* v. *Sunderland B. Soc.* (24 Ch. D. 618). But if the mortgages are created by some one else, merger only occurs if the principle of "equitable non-merger" sustained in the l.c. is inapplicable. In these cases, said Jessel, M.R., in the l.c. "the mere fact of a charge having been paid off does not decide the question whether it is extinguished" (l.c. p. 645).

(1) in the case of limited owners;

He then pointed out that two classes of cases required to be considered: (1) where the charge is paid off by a person having a limited interest, *e.g.* a tenant for life, *Burrell* v. *Egremont* (7 B. 205); *Morley* v. *M.* (5 D. M. & G. 610), a tenant in tail unable to bar the entail, *Alsop* v. *Bell* (24 B. 451); *Countess of Shrewsbury* v. *Earl of S.* (1 V. jun. 227), a tenant in fee simple with an executory devise over *Drinkwater* v. *Coombe* (2 S. & S. 340); (2) where the charge is paid off by a tenant in tail able to bar the entail, *Grice* v. *Shaw* (10 Ha. 76) or in fee. In the first class of cases, the limited owner, without any expression of his intention, retains the benefit of the charge against the inheritance. "Although he has not declared his intention of keeping it alive, it is presumed that his intention was to keep it alive, because it is manifestly for his benefit." The same rule applies on payment by a limited owner of a statutory charge to an U. D. C., *In re Smith's S. E.* ([1901] 1 Ch. 689), and of estate duty under the *Finance Act*, 1894, s. 9 (6). This intention is not rebutted by the mere fact that the relationship of parent and child subsists between tenant for life and remainderman: *In re Harvey* ([1896] 1 Ch. 137); nor by reconveyance "absolutely discharged from the mortgage," *Gifford* v. *Fitzhardinge* ([1899] 2 Ch. 32).

(2) in the case of owners in fee or in tail.

"On the other hand, when the owner of an estate in fee or in tail pays off a charge, the presumption is the other way; but in either case the person paying off the charge can, by expressly declaring his intention, either keep it alive or destroy it. If there is no reason for keeping it alive then, especially in the case of an owner in fee, in the absence of any declaration of his intention, equity will destroy it; but if there is any reason for keeping it alive, such as the existence of another incumbrance, equity will not destroy it." A charge may be expressly preserved by being assigned to a trustee for the purchaser, or by a declaration that the charge shall be treated as remaining on foot for the purpose of protecting the purchaser against mesne incumbrances. The intention, if expressed, governs the case. Or intention may be implied on grounds similar to those in the first class of cases. Thus if the effect of merger would be to prefer other incumbrances, non-merger is inferred from silence: *Forbes* v. *Moffat* (Tudor's L. C. ed. 4, p. 244); *Clarendon* v. *Barham* (1 Y. & C. C. C. 688); *Davis* v. *Barrett* (14 B. 542). Indeed, in *Irby* v. *I.* (25 B. 632) the implied intention was regarded as a general intention which counteracted the meaning of the words used. Such other incumbrances must have been created by persons other than the owner of the equity of redemption, otherwise the rule in *Otter* v. *Vaux*, *Johnson* v. *Webster*, *supra*, would prevail.

Two alleged variations to rule in class (2).

There are two alleged variations of these rules; (*a*) if the debt is paid off by an owner when his title was contingent, a presumption arises that he intended to keep it alive, therefore there is no presumption of merger after it vests in possession, as presumptions are never invoked to rebut previous presumptions: *Wigsell* v. *W.* (2 Si. & St. 364); *Horton* v. *Smith* (4 K. & J. 624) (tail); *Trevor* v. *T.* (2 M. & K. 675) (fee); (*b*) a purchaser of an equity of redemption who pays off or owns earlier mortgages was once supposed to merge the mortgage in the fee: *Toulmin* v. *Steere* (3 Mer. 210). But that case is no longer an authority (see *Stevens* v. *Mid Hants Railway Co.* (8 Ch. 1069), l.c., *Liquidation Estates Co.* v. *Willoughby* ([1898] A. C. 321), and the better opinion seems to be that unless there is an express intention to merge the charge, as in *Parry* v. *Wright* (5 Russ. 142); *Brown* v. *Stead* (5 Si. 535); *Medley* v. *Horton* (14 Si. 226), there is no merger, *Watts* v. *Symes* (1 D. M. & G. 240); *Hayden* v. *Kirkpatrick* (34 B. 645); *Anderson* v. *Pignet* (8 Ch. 180). The l.c. swept away exception (*b*), but it relied, more than succeeding cases have relied, on external evidence.

A third variation is now the law.

Thus in *In re Pride* ([1891] 2 Ch. 135), "the owner of five-sixth shares of the estate was paying off the charge pending a suit to set aside the sale of one-sixth. What is the presumption in such a case? It must be that the person paying off the charge intended to keep it alive as regards that one-sixth, because that is for his benefit; he cannot be presumed to have meant to benefit the person who was seeking to impeach his title." "Therefore, as to the mortgage for £2000, the intention to keep it alive must be presumed," that is to say, this case was put into our first class of cases.

Thorne v. *Cann.*

In *Thorne* v. *Cann* ([1895] A. C. 11), A. B. mortgaged freeholds (*x.*) to C. D., who transferred his mortgage to K. L. Then A. B. mortgaged *x.* to Thorne, and became bankrupt. Then P. purchased *x.* from the trustee in bankruptcy. Then P. paid K. L. with money borrowed from the bank, took a transfer of the mortgage, and deposited the deeds with the bank. Then P. paid the bank with Cann's money, and assigned the mortgage to Cann. Thorne, a purchaser from Cann, objected to the title on the ground that C. D.'s mortgage was extinguished by the transfer to P., and also claimed priority for his own mortgage. The House decided (1) partly from the form of the instrument, but (2) mainly from the circumstances of the case, that it was the intention of the parties to keep the security alive. (1) "I cannot myself conceive," said Herschell, L.C., "when the owner of the equity of redemption paid K. L., what was the object of his taking to himself the assignment of the mortgage debt and all benefits and rights in respect of it, if it was not to keep alive that security." (2) "Nothing, I think," said Lord Macnaghten, "is better settled than this, that when the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit, is simply one of intention. You may find the intention in the deed or in the circumstances attending the transaction, or you may presume an intention from considering whether it is or is not for his benefit that the charge should be kept on foot."

If an intention of non-merger may be presumed without extrinsic evidence, then *Toulmin* v. *Steere* is reversed.

Liquidation Estates Co. v. *Willoughby.*

In *Liquidation E. Co.* v. *Willoughby* ([1896] 1 Ch. 726; [1898] A. C. 321) Lindley, L.J., summed up the result of *Thorne* v. *Cann* as follows:—"Having regard to this decision, it is perhaps now safe to go a little further, and to say that where a purchaser of a property pays off a charge on it without showing an intention to keep it alive, still if its continuance as an existing charge is beneficial to him it will be treated in equity as subsisting, unless an intention to the contrary can be inferred from the terms of the purchase deed or from other legitimate evidence." In this case A. B. was trustee for and mortgagor to K. L. of *v.* (personalty) for (say) £12,000 and for others for other sums. K. L. (1) submortgaged to C. D. for £6,200; C. D. gave notice to A. B.; then A. B. paid £10,122 to K. L.; (2) then K. L. by trust deed submortgaged and mortgaged his interest in *v.* to M. N.; C. D. and M. N. assigned to the company. Held that (2) was not merged in (1). "I cannot understand," said Lord Macnaghten, "a person entitled to several charges on a money fund which must rank in priority according to date of notice sweeping away the earlier charges and trusting to the last, though it might seem large enough to exhaust the fund, and though there might apparently be nothing behind it." Compare *Chetwynd* v. *Allen* ([1899] 1 Ch. 353); *In re Howard's E.* (29 L. R. Ir. 266).

Alleged extensions of this doctrine:

to debts;

The above-mentioned equitable doctrine of non-merger is, since the *J. Act*, 1873, s. 25 (4), binding upon every division of the Supreme Court. It is questionable, however, if the *J. Act* has extended its application. It is a rule that a specialty debt is merged in a judgment debt, so that after judgment the rate of interest will be 4 per cent. This rule was applied in *Ex p. Fewings* (25 Ch. D. 338); and *Popple* v. *Sylvester* (22 Ch. D. 98), where the contrary was held, was distinguished on the ground that there the language of the deed expressly negatived the presumption of merger. But if *Popple* v. *Silvester* is right, and an express intention can prevent merger of debts, it is (to say the least) curious that the doctrine of "implied intention" has never been applied to cases of this kind. There may be two distinct contractual rights with regard to one subject-matter, and this raises questions of construing documents, etc.; such cases have been always recognized at common law (see [1891] A. C. 483, 484); but they have nothing to do with equitable non-merger. Kekewich, J., held, in *Snow* v. *Boycott* ([1892] 3 Ch. 110) (1) that a conveyance by V. of her life-estate to P., the next life tenant operated as a surrender, P.'s estate *pur autre vie* being less than his life-tenancy; and (2) that non-merger by intention could prevent surrender by use of technical words of limitation. Sed quaere? In *In re Barry Ry. Co. and Wimborne* (76 L. T. 489), North, J., followed Kekewich, J., on grounds which are difficult to explain. *Snow* v. *Boycott* was also pressed on the Court in *Ingle* v. *Vaughan-Jenkins*; *Thellusson* v. *Liddard*, *infra*.

to legal estates;

to leases.

The doctrine of equitable non-merger has not been applied to the merger of leases in the reversion, where a quasi-equitable common law doctrine prevails. "Having regard to the parties to the surrender the estate is absolutely drowned. But having regard to strangers who were not parties or privies thereunto, lest by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender, the estate surrendered hath in consideration of law a continuance:" Co. Littl. 338 (*b*); *Saint* v. *Pilley* (L. R. 10 Exch. 137). This legal principle as to the surrender of leases runs in a separate groove. Agreements to grant leases will not merge even at law in a tenancy for life. *Ingle* v. *Vaughan-Jenkins* ([1900] 2 Ch. 368); therefore it was something less than the equitable doctrine of non-merger which in this case preserved the agreement intact. In *Thellusson* v. *Liddard* ([1900] 2 Ch. 635) a lease merged at law in the fee simple, but the grantor expressed an intention to preserve it and its attendant sub-terms. This intention was construed as an agreement valid in an action for specific performance to grant a new term on the same conditions as the vanished sub-term (p. 645); it was not construed as equitable non-merger.

General doctrine of merger, at common law.

Subject to these principles specially applicable to different circumstances, the general law of merger is the same in every species of property, and was thus stated by Lindley, L.J., in *In re Radcliffe* ([1892] 1 Ch. 227): "In order that there may be merger (*a*), the two estates which are supposed to coalesce must be vested in the same person (1), at the same time (2), and the same right (3);" otherwise there is no merger (*b*). This law applies to coextensive legal and equitable interests: *Pitt* v. *P.* (22 B. 294), *In re Selous* ([1901] 1 Ch. 921), (1), (2), (3), (*a*), where a joint tenancy and tenancy in common were regarded as coextensive; to life estates or interests and reversions; *In re Radcliffe*, (3), (*a*), (*b*); *A.-G.* v. *Beech* ([1899] A. C. 53), *A.-G.* v. *de Préville* ([1899] 2 Q. B. 238) (1) (2) (3) (*a*) (estate duty); mortgages and mortgaged estates: *Wilkes* v. *Collin* (8 Eq. 338) (1) (*b*); leaseholds and reversions: *Belaney* v. *B.* (2 Ch. 138) (1) (*b*); *Chambers* v. *Kingham* (10 Ch. D. 743) (3) (*b*); *Russell* v. *Watts* (10 App. Cas. 590) (3) (*b*); *Dynevor* v. *Tennant* (13 App. Cas. 279) (1) (2) (3) (*a*); *interesse termini* and leaseholds: *Hyde* v. *Warden* (3 Exch. D. 72) (3) (*b*); and debts of inferior and superior degree: *Wegg Prosser* v. *Evans* ([1895] 1 Q. B. 108) (3) (*b*); *Ex p. Raatz* ([1897] 2 Q. B. 80) (3) (*b*) (judgment on cheque and contract debt); *Westmorland etc. Co.* v. *Feilden* ([1891] 3 Ch. 15); *In re European Central Railway Co.* (4 Ch. D. 33); *Ex p. Fewings* (*ubi supra*) (1) (2) (3) (*a*); but in bankruptcy merger has no effect, *Ex p. King and Beesley* ([1895] 1 Q. B. 189), cited in *Ex p. Raatz, supra, Squire* v. *Ford* (9 Ha. 47).

See Tudor's Leading Cases on Real Property, *Forbes* v. *Moffat*, p. 244; Ashburner Mortgages, pp. 475 *et seq.*

Locke King's Act.

In re NEWMARCH, NEWMARCH *v.* STORR.

(9 Ch. D. 12.)

Principle.

A charge of "debts" or "just debts" on part of a testator's real estate in aid of his personal estate and in exoneration of his other real estate, is not a sufficient expression of intention within the meaning of Locke King's Acts to exonerate the mortgaged estates from the payment of the mortgage debt.

Summary of facts.

Newmarch died in 1875, having mortgaged the whole of his real estate except seven cottages for £1000. By his will, dated 1875, he devised his real estate in the following manner:—

(1) A close called "Bean Butts" and the seven cottages to trustees for his wife and children.

(2) A house, garden, and other hereditaments to his daughter and to her children.

(3) His mill and the residue of his real estate to his

sons, "charged nevertheless in aid of my personal estate and in exoneration of my other real estate with the payments of my just debts," and his residuary personal estate to his trustees upon trust to sell and divide the net proceeds after payment to his debts between his sons. The C.A. decided that all the real estates subject to the mortgage must contribute rateably (*i.e.* in proportion to their respective values) towards the payment of the £1000 mortgage debt.

The law with regard to the mode in which mortgage debts are to be borne has been completely changed by three Acts:

Locke King's Act.

(1) *Locke King's Act* (17 & 18 Vict. c. 113), or as it is now called "*The Real Estate Charges Act*, 1854," applies only where the person dies on or after the 1st of January, 1855, and to wills, deeds, and documents made after that date.

Locke King's Act Amendment Acts.

(2) 30 & 31 Vict. c. 69, applies "in the construction of the will of any person who may die after the 31st of December, 1867." Other deeds and documents are not mentioned.

(3) 40 & 41 Vict. c. 34, enacts that the two first Acts shall have an extended meaning in the case of a testator or intestate dying after the 31st of December, 1877.

Former law.

In cases not falling within the operation of any of these statutes the heir-at-law or devisee was entitled as a general rule to have the land exonerated from the mortgage debt out of the general personal estate. But there were exceptions to this rule which established that the land was primarily liable (1) where there were express words or a plain intention of the testator that the devisee or legatee should take subject to the mortgage debt. In order to effect this, there must be a sufficient indication of intention, not only to charge the real estate, but also to exonerate the personalty; and the words "subject to the mortgage or incumbrance thereupon" were treated as merely descriptive of the condition of the property; (2) where the debt was not contracted by the person who died last seised or entitled, but the land came to him *cum onere* unless he manifested an intention to adopt it. See Jarman, pp. 1443 *et seq.*; Theobald, pp. 149 *et seq.*

17 & 18 Vict. c. 113.

The first Act provides that where a person is entitled to land, "which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not by his will or deed or other document have signified any contrary or other intention, the heir or devisee . . . shall not be entitled to have the mortgaged debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall as between the different persons claiming through or under the deceased person be primarily liable to the payment of all mortgaged debts with which the same shall be charged, every part thereof according to its value bearing a proportionate part of the mortgage debts charged on the whole thereof." Then a proviso follows which saves the real and personal remedies of mortgagees.

30 & 31 Vict. c. 69.

The utility of this Act was impaired by the decision that a direction to pay debts out of personalty was an intention to the contrary, *Eno* v. *Tatham* (3 D. J. & S. 443); *Moore* v. *M.* (1 D. J. & S. 602), and that vendor's lien for unpaid purchase-money was not included in it. Accordingly it is provided by the second Act, that (1) "a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate, shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said Act" (of 1854), "unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate.

(2) "In the construction of the said Act and of this Act the word mortgage shall be deemed to extend to any lien for unpaid purchase-money upon any lands or hereditaments purchased by a testator."

With regard to this latter Act, Jessel, M.R., in the l.c. observed, "It was a construing and explaining Act; it did not profess to amend the former Act, but to set aside the interpretation that had been put upon it; it was, in fact, a polite way of overruling the decision of the Court of Chancery." The reasoning on which these decisions were based was declared unsound: hence "an intention to the contrary" could only be expressed by specific reference to the mortgage debt: *Gall* v. *Fenwick* (43 L. J. Ch. 178); *Nelson* v. *Page* (7 Eq. 25).

40 & 41 Vict. c. 34.

And then it was found that these two Acts had forgotten "leaseholds:" *Solomon* v. *S.* (33 L. J. Ch. 473); and the estates of intestates: *Nelson* v. *Page* (7 Eq. 25); *Harding* v. *H.* (13 Eq. 493). These flaws were remedied by the third Act, which is itself not a model of perfect draughtmanship: thus it only affects a devisee, legatee, and heir, and not a next of kin, and it only contemplates the expression of an intention by a testator, not (by deed) by an intestate. Moreover, it required a decision of the Court to include leaseholds under the language of this Act: *In re Kershaw* (37 Ch. D. 674). Another decision has excluded estates tail from the scope of these three Acts: *In re Anthony* (2) ([1893] 3 Ch. 498). Moreover, it used the expression "mortgage or any other equitable charge"—an expression which almost invited litigation, until Lindley, L.J., defined "equitable charges" thus:—

"Where land is made security for a debt by any instrument which gives to the person entitled to the charge an equitable interest in the land, such instrument creates an equitable charge within the meaning of" the Act of 1877: *In re Sharland* (74 L. T. 664) (2). It includes an annuity, *ib.*, *Greer* v. *Waring* ([1896] 1 Ir. R. 427), charges on proceeds of land converted by testator or intestate: *In re Bennett* ([1899] 1 Ch. 321), distinguishing *Lewis* v. *L.* (13 Eq. 218), charges by will with debts if specific: *Hepworth* v. *Hill* (30 B. 476), and not in the nature of general lien, *In re Dunlop* (21 Ch. D. 583), a writ of elegit, in pursuance of which land has been taken in execution, *In re Anthony* ([1892] 1 Ch. 450). Lindley, L.J.'s definition seems wide enough to cover purchaser's lien as defined by Stirling, J., in *Levy* v. *Stogdon* ([1898] 1 Ch. 485), and by Farwell, J., in *Whitbread* v. *Watt* ([1901] 1 Ch. 911), citing *Rose* v. *Watson* (10 H. L. C. 672) *; but the question is not free from doubt.

Three points were considered in the l.c.—

The l.c.

(1) Do the Acts apply at all where there is a question of contribution between devisees of different portions of an estate subject to one mortgage debt?

(2) Supposing this question to be answered in the affirmative, what is a sufficient declaration of contrary intention in a will to satisfy the Acts?

(3) Whether the will in question contains a sufficient declaration of a contrary intention.

With regard to the first point, the words "any other real estate of such person" mean "other real estate not descended or devised to such heir or devisee," not "other real estate not comprised in the mortgage," and consequently the different parts of the charged estate in the hands of the devisees had to bear proportionate parts of the mortgage debt according to their value. Similarly in *Gall* v. *Fenwick*, *supra*, *Trestrail* v. *Mason* (7 Ch. D. 655), and *Leonino* v. *L.* (10 Ch. D. 460), the charges were apportioned upon the various real and personal property which was mortgaged, see *Wisden* v. *W.* (5 Jur. N. S. 455); and *Early* v. *E.* (16 Ch. D. 214, n.), *Coleby* v. *C.* (2 Eq. 803), and *In re Athill* (16 Ch. D. 211), decided that a "collateral" is not necessarily a "secondary" security. Points 2 and 3 in the l.c. were disposed of as follows:—Since 30 & 31 Vict. c. 69, a mere charge of debts on personalty or on realty does not indicate a sufficient intention to exonerate the mortgaged estate, and the words in the present will, "just debts" and "in aid of my personal estate and in exoneration of my other real estate," were treated as merely amounting to a declaration that the real estate was to be exonerated only to the same extent as the personalty was aided, and as by *Locke King's Act* the personal estate is not liable, their practical effect was nothing.

Vendor's lien.

In *In re Cockcroft* (24 Ch. D. 94) a testator having contracted to buy real estate, and paid a deposit, specifically devised it. The personal estate was undisposed of. An action for specific performance against his executors and trustees was compromised on the terms that the contract should be rescinded and that the vendor should retain the deposit and be paid his costs. The devisees, alleging conversion, claimed the unpaid purchase-money. The Court assumed that conversion had taken place, but decided that these Acts applied, and that accordingly all that the devisees were entitled to was the real estate charged with the unpaid purchase-money; in other words, to nothing. Compare *In re Kidd* ([1894] 3 Ch. 558).

Intentions to the contrary.

A direction to pay "all my just debts out of my personal estate, in exoneration of my real estate" does not exonerate the mortgaged estate from its primary liability: *In re Rossiter* (13 Ch. D. 355). Jessel, M.R., said that the testator was under the mistaken notion that his debts were primarily charged on his real estate, but the Act expressly said that a direction was insufficient to exonerate the mortgaged estate. "Why should I make a difference because the testator did not know the law? In my opinion there is nothing here referring by necessary implication to any debt charged by way of mortgage on the real estate."

In *In re Smith*, *Hannington* v. *True* (33 Ch. D. 195), where the previous decisions in *Sackville* v. *Smythe* (17 Eq. 153) and *Gibbins* v. *Eyden* (7 Eq. 371) were followed, and *Brownson* v. *Lawrance* (6 Eq. 1) dissented from, testator, after directing the payment of his debts, devised a freehold house to his wife "absolutely to do with as she thinks proper;" and disposed of his residuary realty and personalty on trusts for sale, etc. The Court decided that a mortgage debt on all the realty of testator must be borne rateably by all the properties comprised. North, J., after pointing out that *Brownson* v. *Lawrance* was decided on the grounds that a residuary is not a specific devise, and that this is an error, *Hensman* v. *Fryer* (3 Ch. 420); *Lancefield* v. *Iggulden* (10 Ch. 136), see *In re Mason* ([1901] 1 Ch. 635), said: "I can find nothing else in the will to take the case out of the general rule, except the words 'absolutely to do with as she thinks proper.' But that is no more than a gift to the widow in fee."

In *In re Fleck* (37 Ch. D. 677) testator directed that all his private debts should be paid out of one fund, and his trade debts out of his residue; and devised his real estates on certain trusts. After the date of his will he deposited the title deeds of the real estate with his banker, to secure an overdrawn trade account. The devisee of the real estate was entitled to have it exonerated from the banker's lien.

North, J., said: "I do not consider it necessary under that statute that the debt or debts should be referred to as mortgage debts. Such a debt must be sufficiently described to identify it as being the particular debt which happens to be secured by mortgage. And if a debt is described as the debt which the testator owes his banker, which in fact is secured by mortgage, there would not by that fact be the less an expression of a contrary intention. All that is required is, that the debt shall be specifically described and identified in some way." Compare *Greated* v. *G.* (26 B. 621), *In re Nevill* (62 L. T. 864). Contrast *In re Sharland*, *supra*.

In *In re Campbell* ([1893] 2 Ch. 206) it was decided that a mortgage debt for £17,337 to which the mortgagor would be entitled on the dropping of two lives, was, on the construction of the deeds relating to the mortgage, a mortgage of the interest payable on the £17,337 during the two lives in question, and of the capital sum only in case it should "ever be required" during those two lives; and it was not called in. Consequently after the second life dropped, the devisee of the mortgaged property was entitled to it free and discharged from the £17,337. In other words, the will was construed as though the mortgagor's reversionary interest in the fund must have been held to have merged with his estate in the property mortgaged, subject to the charge being kept separate for a limited period and purpose.

A direction to trustees to hold the net proceeds of the sale of realty and personalty "after and subject to the payment of" testator s debts and legacies, throws the debts and legacies upon the realty, but only in aid not in exoneration of the personalty. "Net" is to be construed as though it meant "after payment of mortgages out of the realty:" *In re Boards* ([1895] 1 Ch. 499), following *Elliott* v. *Dearsley* (16 Ch. D. 322), which must be taken as overruling the *dictum* of Jessel, M.R., in *Gainsford* v. *Dunn* (17 Eq. 405, 408).

Effect of exoneration.

Exoneration may be *pro tanto*, *Rodhouse* v. *Mold* (35 L. J. (Ch.) 67): will not shift charges upon joint on to separate estate: *In re Ritson* ([1899] 1 Ch. 128); nor will it preclude marshalling, in case the order in administration is transposed thereby: *In re Smith, S.* v. *S.* ([1899] 1 Ch. 365).

Order in Administration.

TROTT *v.* BUCHANAN.

(28 Ch. D. 446.)

Principle.

The general personal estate is the primary fund for payment of debts, and funeral and testamentary expenses, unless the testator has either by express words or necessary implication exonerated it. This rule applies where the real estate is charged either by deed or will, but not where specific personal estate is so charged.

Summary of facts.

John Trott by deed conveyed certain real and personal estate to trustees on trust after his decease to sell and pay his debts and funeral expenses out of the proceeds of sale, and hold the balance on trust for his sons and their children. He subsequently by will, after reciting the deed, left all the residue of his property not comprised in the deed for the benefit of his wife and granddaughter. It was held that the estate must be resorted to for the payment of debts in the following order:—

(1) Personalty comprised in the deed.
(2) General personal estate.
(3) Realty comprised in the deed.

In this case the Court followed *French* v. *Chichester* (2 Vern. 568; 3 Bro. P. C., 2nd ed. p. 16), which was decided 200 years ago, and the records of which were found to correct the statement of facts given in Vernon, Brown, and the text-books.

Different effect of charging realty,

The case came twice before the Court. Pearson, J., stated and disposed of the point raised upon the first occasion as follows:—"The testator does not, as he might have done, give to his wife all his real and personal estate not comprised in the trusts of the deed, but he gives her all the residue of his real and personal estate not comprised in the trusts of the deed. There is not a single previous gift in the will. It is not, therefore, a gift of the residue after deducting previous gifts, but still it is a gift of 'residue.' To my mind this can mean nothing else but the residue after making those deductions which by law ought to be made. The words are so strong as to exclude any inference that the testator intended to interfere with the operation of the ordinary rule of law that personal estate is the primary fund for the payment of debts, or that he intended the trust property to be employed in the exoneration of the personal estate."

and personalty.

Subsequently it was discovered that part of the realty represented an unauthorized investment of personalty, and therefore ought to be regarded as personalty subject to the trusts of the deed. Pearson, J., said on this point that, the rule that as against the realty the personalty must bear the debts, unless a testator had expressly "or by some expression of intention of the strongest kind said that it was to be otherwise," did not apply to personal estate specifically appropriated for the payment of debts. Here there was a positive recital of the trust deed, a declaration that the trusts of it were for the payment of the testator's debts, and an express gift to the widow of the residue not comprised in the deed. The latter point is important, for if the residue had been undisposed of, its liability would have taken precedence over that of the personalty specifically given for payment of debts: *Newbegin* v. *Bell* (23 Beav. 386); *Corbet* v. *C.* (I. R. 8 Eq. 407); but see *In re I. Williams* (59 L. T. 310).

Order in absence of intention

Subject to the expression of an intention to the contrary by the testator or intestate, and (as regards mortgage debts) to the *Real* being expressed, of nine classes of property.

Estate Charges Acts (see *ante*, pp. 229–234), the following is the order of application of assets for the payment of debts:—

(1) The general personal estate (including lapsed legacies and shares of residue, whether effectual or lapsed).

(2) Lands devised or directed to be sold to pay debts.

(3) Real property which descends to the heir.

(4) Real property charged with debts, whether devised or passing by descent.

(5) General pecuniary legacies (including annuities and legacy duties on a specific legacy bequeathed free of duty). In this class, however, legacies for value rank before other legacies; and a testator may use words which make one legacy rank before another—as where he gives the rest of a specific fund—but not where he merely says "first," "secondly," etc., nor where he merely gives directions as to time: *In re Schweder's E.* ([1891] 3 Ch. 44).

(6) Specific legacies and real estate devised whether in terms specific or residuary are liable to contribute *pro ratâ*.

(7) Real and personal property over which the testator has a general power of appointment, and which he has appointed by his will or by voluntary deed: *In re Boyd* ([1897] 2 Ch. 232) (married woman). If the property is appointed by a residuary gift, not mentioning the power, such property is treated as though it was testator's own: *Williams* v. *W.* ([1900] 1 Ch. 152).

(8) Land in a foreign country which is governed by the *lex loci rei sitæ*, and therefore not liable for any debts which the law of the foreign country would not cast upon it: *Harrison* v. *H.* (8 Ch. 342).

(9) The testator's or intestate's widow's paraphernalia (which must be distinguished from gifts by the husband to the wife of paraphernal articles since the *M. W. P. Act*, 1882) (*ante*, p. 119).

Classes 5 and 6.

The law as to residuary being on the same footing as specific devisees, and both ranking before pecuniary legatees, was settled in *Tomkins* v. *Colthurst* (1 Ch. D. 626), *Farquharson* v. *Floyer* (3 Ch. D. 109)†, and *Hensman* v. *Fryer* (3 Ch. 420), is only law in so far as it asserts the first of these two principles (see *ante*, p. 277).

Classes 4 and 5.

In re Stokes.

In *In re Stokes* (67 L. T. 223) there was a direction to pay debts and a devise which made the realty chargeable with debts within the meaning of the rule stated thus by Jessel, M.R., in *In re Tanqueray-Willaume and Landau* (20 Ch. D. 465, 476), quoting Fry, J., in *In re Bailey* (12 Ch. D. 268, 273):

"Where there is a direction that the executors shall pay the testator's debts, followed by a gift of all his real estate to them, either beneficially or on trust, all the debts will be payable out of all the estate so given to them. The same rule applies whether the executor takes the whole beneficial interest, as in *Henvell* v. *Whittaker* (3 Russ. 343), or only a life interest, as in *Finch* v. *Hattersley* (3 Russ. 345, n.), or no beneficial interest at all, as in *Hartland* v. *Murrell* (27 Beav. 204). But in all cases in which that has been held, the entirety of the liability has been thrown on the entirety of the estate." Compare *In re De Burgh Lawson* (41 Ch. D. 568) (married woman).

There had been a precisely similar direction and devise in *In re Bate* (43 Ch. D. 600), where Kay, J., held that the fourth and fifth classes of debts must be transposed. Accordingly they were transposed in the second edition of this book and in the fifth edition of Jarman on Wills. Stirling, J., however, pointed out in *In re Stokes* that the most important authorities were not cited before Kay, J., and refused to be bound by his authority. In *In re Butler* ([1894] 3 Ch. 250), Kekewich, J., wavered between Kay, J., and Stirling, J. In *In re Salt* ([1895] 2 Ch. 203), Chitty, J., followed Stirling, J., saying, "The reasoning of Stirling, J., in *In re Stokes* appears to me to be unanswerable" (p. 204), which is surely the case.

Class 4.

As to what words charge realty with debts, see *In re Head's Trustees and Macdonald* (45 Ch. D. 310) (power); *In re Green* (40 Ch. D. 610) (income).

Legacies and debts charged on realty.

In *In re Bawden* ([1894] 1 Ch. 693) a testator bequeathed pecuniary legacies *inter alia*, and bequeathed and devised all his real and personal estate "not otherwise disposed of" to his executor. On the principle of *Greville* v. *Browne* (7 H. L. C. 689), followed in *In re Dyson* ([1896] 2 Ch. 720), *In re Smith, S.* v. *S.* ([1899] 1 Ch. 365), *In re Adams and Perry's C.* ([1899] 1 Ch. 554), the legacies were chargeable on the residuary realty in aid of the residuary personalty. It was held that in order to provide for payment of the testator's debts the residuary realty ought to be valued without making any deduction for the legacies charged thereon. This last point was decided on the authority of *In re Saunders-Davies* (34 Ch. D. 482)†.

Class 6. Specific bequests.

The law with regard to the exemption of personal estate specifically bequeathed was thus stated by Lord Selborne in *Robertson* v. *Broadbent* (8 A. C. 815): "If the bequest is of a particular chattel, such as a horse or a ship, it is manifest that the testator intended the thing itself to pass unconditionally and *in statu quo* to the legatee, which could not be if it were subject to the payment of general and testamentary expenses, debts, and pecuniary legacies. As against creditors the testator cannot wholly release it from liability for his debts, but as against all persons taking benefits under his will he may. The same principle applies to everything which a testator, identifying it by a sufficient description and manifesting an intention that it should be enjoyed or taken in the state or condition indicated by that description, separates in favour of a particular legatee from the general mass of his personal estate." It was decided in this case that a gift "of all my personal estate and effects . . . which shall not consist of money or securities for money" was not specific. And see *ante*, pp. 154, 156 (3), (13), 157 (14); *In re Green* (40 Ch. D. 610)†; *Fairer* v. *Park* (3 Ch. D. 309). Contrast *Powell* v. *Riley* (12 Eq. 175) ("all my household goods and furniture"). In *In re Marten* ([1901] 1 Ch. 370) a specific was distinguished from a pecuniary legacy.

Exoneration of personalty.

Where personalty was exonerated from payment of debts by express words, such exoneration does not enure for the benefit of those who take otherwise than under the will: *Kilford* v. *Blaney* (31 Ch. D. 56).

Personalty only exonerated from payment of debts pays administration costs *pro ratâ: In re Fitzgerald* (26 W. R. 53).

Special debts. Testamentary expenses.

A charge of or direction to pay "testamentary expenses" includes costs of actions for administering personalty: *Miles* v. *Harrison* (9 Ch. 316); *Harloe* v. *H.* (20 Eq. 471); *Ralph* v. *Carrick* (5 Ch. D. 998); *Penny* v. *P.* (11 Ch. D. 440); *Sharp* v. *Lush* (10 Ch. D. 468)† ("executorship expenses"): and of actions to construe parts of a will, *In re Groom* ([1897] 2 Ch. 407), but not costs, payable out of the estate, of opposing the will: *In re Prince* ([1898] 2 Ch. 225). Testator's widow's testamentary expenses include costs of taking out administration, and disputing an invalid will, and estate duty on her personalty, *In re Clemow* ([1900] 2 Ch. 182), *In re Treasure* ([1900] 2 Ch. 649), but not on her realty, though she died after the date of the *Land Transfer Act*, 1897: *In re Sharman* ([1901] 2 Ch. 280).

Building contracts.

Personalty, etc., in the above order bears the cost of completing building contracts on land devised by testator or passing to the heir-at-law of an intestate: *In re Day* ([1898] 2 Ch. 510).

Incidence of estate duties.

Estate duty and settlement estate duty under the *Finance Act*, 1894, are a first charge on "property not passing to the executor as such," and the owners of such property must pay or repay duties levied in respect of such property according to their beneficial interests. Such property includes (1) freeholds and (2) copyholds, *In re Palmer* ([1900] W. N. 9); (3) all appointed property (probably), *In re Treasure* ([1900] 2 Ch. 648); *In re Maddock* ([1901] 2 Ch. 372); *In re Power* ([1901] 2 Ch. 659); *In re Dixon* (Dec. 9th, 1901), but see *In re Moore* ([1901] 1 Ch. 691); (4) all property settled by deed whereby deceased reserved a life interest, *In re Meyrick* ([1897] 1 Ch. 99); (5) gifts within a year of deceased's death, *In re Foster* ([1897) 1 Ch. 484); *In re Beddington* ([1900] 1 Ch. 771). If the property is £4000, part of a larger sum whereof the residue is payable to the executors, the duties on the £4000 probably comes out of the £4000: *In re Meyrick* ([1897] 1 Ch. 99); but see *Wade* v. *W.* ([1898] 2 Ch. 276). So in cases (4) and (5) account-stamp duties leviable under the Act of 1881, s. 38, sub-s. 2 (*c*), and the Act of 1889, s. 11, were apportioned between specific and residuary appointees: *In re Croft* ([1892] 1 Ch. 652); *In re Shaw* ([1895] 1 Ch. 343). And the same rule is applicable to appointments, in distributing the burdens of estate duty under the Act of 1894 among appointees: *In re Orford* (*Countess of*) ([1896] 1 Ch. 257). Annuities charged on the property are capitalized in order to ascertain the quota payable by annuitants: *In re Parker-Jervis* ([1898] 2 Ch. 643); *In re Duke of St. Albans* ([1900] 2 Ch. 873).

In equity, stamp duties payable under sect. 27 of the *C. and I. R. Act*, 1881, and estate duties payable under sect. 5 of the *C. and I. R. Act*, 1889, were, like the old probate duty, payable out of the general personal estate: *In re Bourne* ([1893] 1 Ch. 188). And the same holds good with regard to the estate duty in respect of property passing to the executor as such under the *Finance Act*, 1894, and including specific legacies, *In re Culverhouse* ([1896] 2 Ch. 251), money covenanted by marriage settlement to be paid after the settlor's death, *In re Gray* ([1896] 1 Ch. 620), and insurance moneys: *A.-G.* v. *Dobree* ([1900] 1 Q. B. 442); *A.-G.* v. *Hawkins* ([1901] 1 Q. B. 285).

"Settlement estate duty" is always provided out of the settled property unless the will or settlement otherwise ordains, *In re Maryon-Wilson* ([1900] 1 Ch. 565)*, overruling *In re Webber* ([1896] 1 Ch. 914), *In re Gibbs* ([1898] 1 Ch. 625), and citing *Finance Act*, 1896, s. 19, etc.; *e.g.* by giving the settled property "clear of deductions," *ib.*, *In re Parker-Jervis* ([1898] 2 Ch. 643), by directing payment of estate duty, *In re Leveridge* ([1901] 2 Ch. 830), but not by setting apart a fund for duties generally: *In re Lewis* ([1900] 2 Ch. 176). *In re Maryon Wilson* was followed in *In re Duke of St. Albans* ([1900] 2 Ch. 873).

The definition of "a settlement" is borrowed from the *S. L. Act*, 1882, and includes jointures and portions (1) limited to arise after the death of a tenant for life, or (2) if a certain part of the estate is set apart to provide them: *A.-G.* v. *Owen* ([1899] 2 Q. B. 253); *In re Duke of St. Albans* ([1900] 2 Ch. 873); *In re Campbell* ([1901] W. N. 228). Contingent settlements are included, but the duty is repayable if the contingency does not occur: *Finance Act*, 1898, s. 14; *A.-G.* v. *Clarkson* ([1900] 1 Q. B. 156)†.

Costs of realty.

The rule settled by *In re Middleton* (19 Ch. D. 552); *In re Price* (31 Ch. D. 485); *Patching* v. *Barnett* (51 L. J. (Ch.) 74); *In re Roper* (45 Ch. D. 126); *In re Copland* (44 W. R. 94), is that the costs of an administration action, so far as they have been increased by the administration of the real estate, are to be borne by the real estate. A charge of testamentary expenses on personalty does not alter this rule, *ib.* The *Land Transfer Act*, 1897, has made no difference in this respect: *In re Jones, Elgood* v. *Kinderley* ([1901] W. N. 217). It was also laid down in *In re Middleton* (*ubi supra*) that where the estate is insufficient the plaintiff is not necessarily entitled to his costs in priority to the defendants.

Deceased insolvents.

The *Judicature Act*, 1875, s. 10, makes the order of debts the same as in bankruptcy, *e.g.* as to postponing wife's loans to husband under *M. W. P. Act*, 1882, s. 3, *In re Leng* ([1895] 1 Ch. 652), as to preferring rates and wages, *In re Heywood* ([1897] 2 Ch. 593), and equalizing voluntary creditors with those for value, *In re Whitaker* ([1901] 1 Ch. 9), overruling *In re Maggi* (20 Ch. D. 545).

Marshalling.

If any of the above-mentioned rules are violated, the disturbance is readjusted by marshalling. See Theobald, 5th ed. pp. 721 *et seq.*; Jarman, 5th ed. pp. 1425 *et seq.*; Seton, pp. 1406–1408.

Marshalling.

WEBB *v.* SMITH.

(30 Ch. D. 192.)

Principle.

Assets will not be marshalled in favour of a creditor to the prejudice of another man's rights.

Summary of facts.

Smith, an auctioneer, had in his hands the proceeds (*a*) of a brewery, £82, (*b*) of furniture, £207, sold by him for Canning. Canning, who owed Webb £503, wrote to Smith requesting him to pay Webb the £503 on the completion of the purchase of the brewery, and to charge the same to his account. Smith wrote to Webb that he would comply with these instructions; and then paid himself his expenses, £177, out of the £289, and paid the balance, £112, to Canning. Webb claimed that Smith ought to have marshalled the two funds and charged the brewery expenses upon the furniture fund, so as to leave the brewery money available for payment of his debt; but the C. A. decided that the doctrine of marshalling did not apply.

Marshalling.

This case was characterized by the C. A. as one "in which an experiment was tried for the first time with regard to the doctrine of marshalling," the difficulty arising from certain expressions of Lord Eldon in *Aldrich* v. *Cooper* (W. & T. L. C. i. 36)*: see l.c. p. 200. The general principle of marshalling is "that a person having resort to two funds shall not by his choice disappoint another having one only:" l.c. p. 202, citing *Trimmer* v. *Bayne* (9 V. 211).

Equitable assignment.

The letters addressed by Canning to Smith, and Smith to Webb constituted an equitable assignment of the brewery fund in favour of the latter (comp. pp. 23, 59 *et seq.*), so that Smith would hand over any portion of that fund to Canning at his own risk. Now Smith had, on the authority of *Robinson* v. *Rutter* (4 E. & B. 954), a particular lien on the (*a*) fund; and he also had a particular lien on

Case for marshalling.

the (*b*) fund. How, then, could he pay over the latter to Canning otherwise than at his own risk if he could resort to two funds and Webb only to one fund? The answer was that he could only resort to the two funds for distinct purposes: to the brewery fund for the brewery expenses, and to the furniture fund for the furniture expenses. Had he paid the brewery fund to Webb there would have been no fund out of which he could repay himself the brewery expenses. True, if Smith had retained the furniture fund, and Canning had sued him for it, Smith might have pleaded set-off: R. S. C., 1883, Order xix., r. 3; *Roxburghe* v. *Cox* (17 Ch. D. 520); but the Court may, or in some cases, *Hassell* v. *Stanley* ([1896] 1 Ch. 607); *Phillips* v. *Howell* ([1901] 2 Ch. 773), must refuse set-off, so that set-off is not so secure a remedy as lien, and marshalling has never been employed so as to compel a creditor to accept an insecure for a secure remedy. "In the present case," said Lindley, L.J., "there were not two funds to which the defendants could resort, that is, two funds standing upon an equal footing. The defendants had a superior right of lien as to the fund produced by the sale of the brewery. I think, however, that they could not have deprived the plaintiff of the benefit of his charge, if there had been two funds to which they might have resorted under equal circumstances."

Marshalling as between beneficiaries.

The doctrine of marshalling is applied in favour of a beneficiary under a will or intestacy where debts have been paid out of property to which he is entitled instead of out of a fund from which they are properly payable, having regard to the order of liability of different classes of property for payment of debts (*ante*, p. 283). Thus, for example, a specific devisee or legatee, if called upon to pay debts of the testator, is entitled to have the whole of the assets comprised in the first five classes marshalled in his favour. So, too, though upon a different principle, where some legacies are charged on realty and others are not, equity will marshal the legacies so as to throw upon the realty those charged thereon, and to leave the personalty free for the payment of the others: *Scales* v. *Collins* (9 Ha. 656); and see *ante*, pp. 278 *et seq.*

The following examples elucidate other applications of this doctrine:—

Marshalling as between creditors (mortgage debts)

(1) If C. D. has a charge upon *x.* and *y.*, and if K. L. also has a charge upon *y.* only, C. D. must take payment of his charge out of *x.*, and must leave *y.* so that K. L., the other creditor, may follow it and obtain payment of his debt out of it: per Cotton, L.J., in the l.c.

(2) A. B. mortgages *x. y.* to C. D., then *x. z.* to K. L.; K. L. may compel a surety who has paid off C. D. to satisfy himself out of *y.*: *South* v. *Bloxam* (34 L. J. Ch. 369).

(3) There are three successive mortgages by A. B. to C. D., K. L., and M. N.; C. D. is mortgagee of *x.* and *y.*; K. L. of *x.*; M. N. of *x.* and *y.* C. D.'s mortgage absorbs *x.* K. L. may satisfy his claim out of *y.*, to the extent to which C. D. would have done had he apportioned his charge rateably on *x.* and *y.*, *Barnes* v. *Racster* (1 Y. & C. C.

C. 401); *Bugden* v. *Bignold* (2 Y. & C. C. C. 377), unless the third mortgage is expressed to be for the rest of x. y. after satisfying C. D. and K. L.: *In re Mower's T.* (8 Eq. 110). See (13), (14).

(4) A. B. is devisee of x. y. charged with £500 (say). He then mortgages x. to C. D. for £2535, y. to K. L. for £1500, and becomes bankrupt. x. is sold for £2590, y. for £2500. C. D. is entitled to have the £500 paid out of the £2500: *Ex p. Hartley* (1 Dea. 288).

(5) A. B. (a tenant of C. D.) mortgages x. to K. L. C. D. distrains on x. y. A. B. becomes bankrupt. C. D. sells x. K. L. can go against y (up to the value of x.): *Ex p. Stephenson* (De G. 586).

(6) C. D. is mortgagee of realty for £1000; A. B. the mortgagor dies. Then (1) C. D. satisfies himself out of A. B.'s personalty. Legatees of A. B. can raise £1000 out of his realty. (2) C. D. is also executor and legatee of A. B. He need not retain his legacy out of the personalty, nor will the Statute of Limitations run against him if he does not do so: *Binns* v. *Nichols* (2 Eq. 256).

(partnership debts)

(7) K. L. deposits brandy with a partnership of which A. B. and G. H. are members. G. H. wrongfully assigns it to a bank to secure a partnership debt, which A. B. (who is not liable for the fraud) guarantees. The bank sell the brandy. The firm becomes bankrupt. K. L. can prove to the extent of the guarantee against A. B.'s separate assets: *Ex p. Salting* (25 Ch. D. 148), following *Ex p. Alston* (4 Ch. 168).

(bottomry bonds)

(8) K. L. being master of a ship, gives a bottomry bond on (A. B.'s) ship, freight, and (E. F.'s) cargo to C. D. M. N. are Necessaries men who can only claim against ship and freight. The ordinary Admiralty rule that C. D. must first go against ship and freight applies; and the Court will not marshal in favour of M. N., as this would be unfair to E. F.: *The Chioggia* ([1898] P. 1).

(9) K. L. being master of a ship, has a lien on ship and freight; and he executes bottomry bonds on ship, freight, and cargo to C. D., and binds himself thereunder. K. L. may satisfy his claims in priority to C. D. out of the ship and freight in cases where C. D. can satisfy his claim out of the cargo and (subject to K. L.'s claim) ship and freight: *The Edward Oliver* (L. R. 1 A. & E. 379); *The Eugènie* (L. R. 4 A. & E. 123). The ordinary Admiralty rule is thus waived.

(10) "The holder of a bottomry bond tried to compel the crew of a ship to waive their right of maritime lien for wages for services rendered, and to sue owners, who were perfectly solvent. The holder of the bottomry bond had only a remedy against the ship, whereas the crew had also a personal remedy by action of debt against the owners. The Judge of the Court of Admiralty held that he had no jurisdiction to restrain the proceedings of the crew against the ship, and to compel them to resort to a personal remedy against the shipowners; and the reason given was that there was not two funds under the control of the Court:" per Lindley, L.J., in the l.c., citing *The Arab* (5 Jur. N. S. 417).

(company's debts).

(11) An insurance company has limited liability towards its policy holders; unlimited towards its general creditors and for costs. (1)

A general creditor is mortgagee, and pays himself out of the limited assets. The policy holders have no right to marshal: *In re International Life Ass. Soc.* (2 Ch. D. 476). (2) Some shareholders compromise their unlimited liabilities under the *Companies Act*, 1862, s. 160. Those who do not, pay further calls for costs; but may not marshal the compromise-money as between liability for costs and under policies: *In re Accidental Death Ins. Co.* (7 Ch. D. 568).

The effect of assignment is as follows:

Effect of assignment in cases of mortgage.

(12) A. B. mortgages x. y. to C. D., then x. to K. L. (*a*) K. L. may compel C. D. and all claiming through him as volunteers to have primary recourse to y. only; (*b*) then y. to E. F., E. F. and K. L. can make C. D. apportion his charge between x. and y. rateably per Kay, L.J., in *Flint* v. *Howard* ([1893] 2 Ch. 54)*. See (3).

(13) A. B. mortgages x. $y.^{\mathrm{i}}$ to C. D., then x. $y.^{\mathrm{ii}}$ to K. L. with notice of C. D., then $x.^{\mathrm{iii}}$ to K. L. K. L. releases $x.^{\mathrm{ii}}$ and assigns $x.^{\mathrm{iii}}$ to E. F. K. L. and E. F. can make C. D. apportion his charge between x. and y. rateably, *ib.* *Ditto* if K. L. redeems C. D. and keeps $x.^{\mathrm{i}}$ alive; see *Mutual L. Ass. Co.* v. *Langley* (32 Ch. D. 460). *Ditto* if there are fourth mortgagees. *Ditto* if E. F. is C. D.: *Flint* v. *Howard.*

(14) A. B. mortgages x. to C. D., a building society (C. D. can also come on y.), then to K. L., then assigns y. to E. F. As between K. L. and E. F., C. D. must be held to have satisfied his charge out of x. and y. rateably. *Anstey* v. *Newman* (59 L. J. Ch. 524). See p. 257 (*d*), (*e*).

(15) K. L. is a secured creditor of A. B.'s life estate, which arises under a voluntary deed; C. D. being mortgagee of the fee simple by deed subsequent to the voluntary deed, could defeat the latter under 27 Eliz. c. 4. A. B. satisfies C. D. partly out of his life estate. No marshalling arises as A. B.'s remedy is as transferee of C. D.'s mortgage; and K. L. (like a trustee in bankruptcy (4) and (5)) cannot take any other remedy than what A. B. had: *Dolphin* v. *Aylward* (L. R. 4 H. L. 486). As to cases under this Act, see *Moxon* v. *Berkeley B. Soc.* (39 L. J. Ch. 769).

Statute law supersedes marshalling.

Under the old law cases arose for the application of the doctrine of marshalling, which have now been obviated by legislation. This has been the case as between debtor and creditor. Thus by 3 & 4 Will. IV. c. 104, freeholds and copyholds were rendered liable for simple contract debts, and by 32 & 33 Vict. c. 46, simple contract and specialty debts were placed on an equality in the administration of the estates of persons dying on or after the 1st of January, 1870. Again, *Locke King's Acts* have in many cases made marshalling unnecessary. Similarly marshalling will not be necessary where persons die after the 5th of August, 1891, in the case of gifts by will to charities (54 & 55 Vict. c. 73): *In re Bridger* ([1894] 1 Ch. 297). Before that Act equity used to marshal assets in favour of charities only when there was a direction to marshal: and throw debts and legacies on impure personalty: *Mogg* v. *Hodges* (2 V. 52).

Cases where assets are marshalled for charities.

(16) Thus a gift to charities of residue, coupled with a direction that the residue so given shall consist of pure personalty exclusively, *In re Arnold* (37 Ch. D. 637), or that "only such part or parts of his estate and premises should be comprised in the residue thereof" as should be legally applicable to charities, *Wills* v. *Bourne* (16 Eq. 487); *Miles* v. *Harrison* (9 Ch. 316), is a direction to marshal: compare *Gaskin* v. *Rogers* (2 Eq. 284), *In re Pitt, Lacy* v. *Stone* (53 L. T. 113).

(17) A mere gift of residue "save and except such parts thereof as cannot by law be appropriated by will" to charities is not a direction to marshal: *In re Somers-Cocks* ([1895] 2 Ch. 449).† Compare *Lewis* v. *Boetefeur* (38 L. T. 93), *Tempest* v. *T.* (7 D. M. & G. 470), *Beaumont* v. *Oliveira* (4 Ch. 309) (order).

Practice.

(18) The rule of the Court in such cases is to appropriate the fund as if no legal objection existed as to applying any part of it to the charitable legacies, then holding so much of it to fail as would in that way be payable out of the prohibited fund: per Lord Cottenham in *Williams* v. *Kershaw* (1 Keen, 275, n.); and see *Robinson* v. *Governors of the London Hospital* (10 Hare, 19); *Johnson* v. *Lord Harrowby* (Johns. 425); *In re Hill's T.* (16 Ch. D. 173); *In re Somers-Cocks, supra.*

Interest is payable.

(19) Where contribution is ordered between different funds "each of them ought to be placed in the same position as if it had contributed its proper proportion at the time at which it ought to have done so," and therefore the fund must contribute interest: *Ashworth* v. *Munn* (34 Ch. D. 391). See Tudor's Law of Charities and Mortmain, 3rd ed. pp. 58 *et seq.*, and notes to *Corbyn* v. *French*, Tudor's Real Property Cases, Ashburner Mortgages, pp. 381 *et seq.*, W. & T. L. C. i. 36 *et seq.*

Contribution among Sureties.

STEEL *v.* DIXON.

(17 Ch. D. 825.)

Principle.

The principle as between co-sureties is equality of burden and benefit.

Summary of facts.

Money was advanced to Robinson on the security of a promissory note for £800, which Dixon, Gurney, Steel, and Chater signed as sureties. Dixon and Gurney only consented to sign if security were given, and Robinson afterwards assigned property securing their share of money payable on the note. Steel and Chater had no knowledge of this arrangement, but it was held that they were entitled to share in the benefit of the security held by Dixon and Gurney.

Equality of contribution is the equity,

There being no English authority bearing precisely upon the subject, the Court was guided by American precedents based on the rule in *Dering* v. *Earl of Winchilsea* (W. & T. L. C. ii. 535 [1787]), that "as between co-sureties there is to be equality of the burden and of the benefit." "Co-sureties" means co-sureties for one and the same debt: *Johnson* v. *Wild* (44 Ch. D. 146). And "equality," said Fry, J., "does not mean necessarily equality in its simplest form, but what has been sometimes called proportionable equality. The result of the case of *Dering* v. *Earl of Winchilsea* was expressed by Baron Alderson in *Pendlebury* v. *Walker* (4 Y. & C. Ex. p. 441) in these terms, that 'where the same default of the principal renders all the co-sureties responsible, all are to contribute; and then the law superadds that which is not only the principle but the equitable mode of applying the principle, that they should all contribute equally, if each is a surety to an equal amount; and if not equally, then proportionably to the amount for which each is a surety.' I hold, therefore, that the result of *Dering* v. *Earl of Winchilsea* is to require that the ultimate burden, whatever it may be, is, as between the co-sureties, to be borne by them in proportion to the shares of the debt for which they have made themselves responsible. If that be the case, it follows that each surety must bring into hotchpot every benefit which he has received in respect of the suretyship which he undertook."

which may be renounced by contract, or forfeited by default.

He added, however, that the equity which raised the surety's right to have all benefits brought into hotchpot, may be varied or departed from. Thus—

(1) The co-sureties may renounce or contract themselves out of the benefit. Merely taking other security is not such a contract: *Lake* v. *Brutton* (8 D. M. & G. 440); *Brandon* v. *B.* (3 D. & J. 524).

(2) "One co-surety, by reason of his default in performing his duty towards another co-surety, may estop himself from asserting the equity which he would otherwise have had against him." Misrepresentation of facts, but not of an intention to abandon the equity, would create estoppel: *Chadwick* v. *Manning* ([1896] A. C. 231).

The following examples explain themselves:—

Decision of l.c. followed.

(1) In the l.c. only £400 out of the total proceeds of the security was brought into hotchpot. It may be wondered why the whole £800 was not claimed. Dixon and Gurney had to hand over £200 out of this £400 to their co-sureties, and were therefore £200 out of pocket.

Did not the guarantee cover this second £200? And if so, ought not the second £200, too, to be brought into hotchpot? Where could you stop? Ought it not to cover the whole fund? The very question was asked in *Berridge* v. *B.* (44 Ch. D. 168), and answered in the affirmative. A counter-security to the one guarantor for his liability must include the whole debt.

(2) Successive endorsers of a promissory note have been held to have acted not upon the contract implied by law merchant—under which each successor indemnifies his predecessor and becomes entitled to the securities of the indemnified: *Duncan, Fox & Co.* v. *N. and S. Wales B.* (6 App. 1)—but upon the equitable contract of suretyship; and the endorser who paid the note became entitled to equal contribution from all the other endorsers: *Macdonald* v. *Whitfield* (8 A. C. 733), applying *Reynolds* v. *Wheeler* (10 C. B. N. S. 561), and distinguishing cases such as *Steele* v. *McKinlay* (5 A. C. 754); *Jenkins* v. *Coomber* ([1898] 2 Q. B. 168); *Gardner* v. *Brooke* ([1897] 2 Ir. R. 6).

(3) Conversely, an apparent co-surety has been held to be only a collateral surety: *Craythorne* v. *Swinburne* (14 V. 160).

(4) In *In re Arcedeckne* (24 Ch. D. 709) one of the sureties jointly with his father paid the guaranteed debt; the son was only allowed to enforce contribution from his co-sureties on bringing into hotchpot a security which his father had received from the creditor. Pearson, J., said, "I treat the father and son as if they were 'one person.'"

(5) Where there are two sureties equally liable on a bond, and one dies, and a new bond is given so as to make deceased's estate still liable, but making a new equally liable with the continuing surety, the liability as between the three sureties will be in thirds: *In re Sir J. Ennis* ([1893] 3 Ch. 238).

(6) Where there are four sureties for £150, two limiting their liability to £50, and two to £25, and £60 is payable, the first two will each pay £20 and the second two £10 each: *Ellesmere Brewery Co.* v. *Cooper* ([1896] 1 Q. B. 75).

(7) Down to *In re Walker* ([1892] 1 Ch. 621), it was thought that a case two hundred years old, *Mawer* v. *Harrison* (I Eq. Cas. Abr. 93), had decided that a principal creditor (C.) takes the benefit of counter-securities given to the surety (S.) by the debtor (D.); but Stirling, J., having sent for the record which did not bear out this absurd idea, decided the opposite.

Mercantile Law Amendment Act, 1856.

(8) S.'s right to indemnity from his co-sureties ranks with simple contract debts, though he be surety to a bond: *Ferguson* v. *Gibson* (14 Eq. 379); *In re Illidge* (27 Ch. D. 482); unless there is a contract by deed to indemnify him: *In re Allen* ([1896] 2 Ch. 345); but having paid on the bond he becomes entitled to it, both at equity and under the *Mercantile Law Amendment Act*, 1856, s. 5; a substitution takes place similar to that in marshalling and subrogation, and he is *ipso facto* transformed into specialty creditor.

(9) In *In re McMyn* (33 Ch. D. 575) S., who had satisfied a judgment obtained by C. against D. and her co-surety, was entitled to stand in

the place of C., and thus obtain priority over the unsecured creditors in an administration action (see *In re Maggi* (20 Ch. D. 545), cited *ante*, p. 283), although she had not obtained an assignment of the judgment.

(10) A surety to the Crown who has paid the debt of his deceased principal, is entitled to the Crown's priority in the administration of his principal's estate: *In re Lord Churchill* (39 Ch. D. 174).

Surety and bankrupt co-surety.

(11) If S. is bankrupt the co-sureties must bear the loss proportionately *inter se*: *Hitchman* v. *Stewart* (3 Drew, 271);

(12) But if C. puts in a proof for his whole debt, the co-surety can pay C. and continue to prove for the whole debt; although he is not allowed to recover more than the amount for which he is liable, as between surety and surety. Davey, L.J., intimated that this rule would probably not apply if proof had not been already put in: *In re Parker* ([1894] 3 Ch. 400).

(13) If S. guarantees £2000 (being part of a floating balance), and C. proves for the whole debt (£4000) against D., and gets £1000 by so proving, and then claims to recover £2000 from S., S. may counterclaim from him £500. That is to say, if C. gets a quarter of his debt from the bankrupt he can only get three-quarters of the guarantee from S.: *Gray* v. *Seckham* (7 Ch. 680).

(14) So, too, if C. first recovers £2000, from S. he can then prove for £4000, accounting to S. for the dividends on £2000, unless S. has by contract renounced such right of account: *Ex p. Nat. Prov. B. of England, In re Sass* ([1896] 2 Q. B. 12)†, citing *Ex p. ditto, In re Rees* (17 Ch. D. 98); *Midland Banking Co.* v. *Chambers* (4 Ch. 398); *Commercial B. of Australia* v. *Wilson's O. A.* ([1893] A. C. 181).

(15) If S. has guaranteed £2000 part of an ascertained debt of £4000, (13) and (14) do not apply: *Ellis* v. *Emmanuel* (1 Exch. D. 157)†.

Sureties to a mortgage.

(16) Securities given by C. to D. before or after the suretyship enure for the benefit of S.: *Drysdale* v. *Piggott* (8 D. M. G. 546); *Newton* v. *Chorlton* (10 Ha. 646); cited in *Forbes* v. *Jackson* (19 Ch. D. 615)†.

(17) S. "is entitled to have all the securities preserved for him which were taken at the time of the suretyship, or as I think it is now settled subsequently:" per Hall, V.C., in *Forbes* v. *Jackson*, *Campbell* v. *Rothwell* (47 L. J. Q. B. 146).

(18) S. may redeem the principal mortgage debt, *Green* v. *Wynn* (4 Ch. 204), and having redeemed takes the securities held by C. free from further charges, tacks, etc., created by C. after notice of the suretyship: *Forbes* v. *Jackson*, *In re Toogood's Legacy T.* (61 L. T. 19); *Dixon* v. *Steel* ([1901] 2 Ch. 602); and with the right of consolidation which the mortgagee had: *Heyman* v. *Dubois* (13 Eq. 158). (17) and (18) follow from principles generally applicable to mortgages: *Hopkinson* v. *Rolt* (9 H. L. C. 514); *Daun* v. *City Brewery Co.* (8 Eq. 155).

Actions of indemnity.

(19) At common law an action for contribution was represented by the quasi-equitable action for "money paid to the use" of the

defendant; consequently the money had to be actually paid before any right of action accrued. So, too, a surety cannot take out a debtor's summons and make his co-surety bankrupt until he can show that he has paid his proportion or more than his proportion of the whole debt: *Ex. p. Snowdon* (17 Ch. D. 44).

(20) So, too, an action for indemnity is refused if there is no reasonable fear of loss: *Antrolus* v. *Davidson* (3 Mer. 579); *Lloyd* v. *Dimmack* (7 Ch. D. 398); *Hughes Hallett* v. *Indian Mammoth Gold Mines Co.* (22 Ch. D. 561).

(21) On the other hand, the right has been asserted in *Wooldridge* v. *Norris* (6 Eq. 410); *Lacey* v. *Hill* (18 Eq. 182); *Cruse* v. *Paine* (4 Ch. 441) (see order); *Hobbs* v. *Wayet* (36 Ch. D. 256); *Mathews* v. *Saurin* (31 L. R. Ir. 181); and *Wolmershausen* v. *Gullick* ([1893] 2 Ch. 514)†. In *Wolmershausen* v. *Gullick* a claim in an administration action by C. against S.'s estate for the whole debt had been allowed; and third party procedure was held to be inapplicable to an administration action. S.'s executrix then brought an action (before she paid anything) for indemnity; and a declaration was made that she was entitled to indemnity, and to apply in Chambers whenever she should pay anything.

(22) In the same case the co-surety had been bankrupt and discharged before S. had been called on to pay anything; he was held to be discharged from this debt; suretyship liability being provable in bankruptcy: *Hardy* v. *Fothergill* (13 A. C. 351)*; *In re Blackpool Motor Car Co.* ([1901] 1 Ch. 77); and the surety's right to indemnity being his "property": *In re Perkins* ([1898] 2 Ch. 182).

Statute of Limitations.

(23) For the purposes of the *Statute of Limitations*, no debt accrued as between surety and co-surety until their reciprocal liability was ascertained by judgment or allowance: as in the case between co-trustees, *ante*, p. 206, *ib.*, and *Gardner* v. *Brooke* ([1897] 2 Ir. R. 6).

(24) As between S. and C. the date of the advance is the date from which the Statute runs so far as the principal debt is concerned: *Parr's Banking Co.* v. *Yates* ([1898] 2 Q. B. 460).

Miscellaneous.

(25) If S. guarantees a debt "on demand," the Statute runs from the making of a demand: *In re Brown's E.* ([1893] 2 Ch. 300).

(26) A broker was regarded as surety in *Imperial B.* v. *London & St. K. Docks Co.* (5 Ch. D. 195); as insurer in *Dane* v. *Mortgage Ins. Corp.* ([1894] 1 Q. B. 54); as principal in *In re Westzinthus* (5 B. & Ad. 817).

(27) Receiver's recognisances were construed in *In re Graham* ([1895] 1 Ch. 66); continuing guarantees in *In re Silvester* ([1895] 1 Ch. 573), commenting on *Coulthart* v. *Clementson* (5 Q. B. D. 42), and in *Burgess* v. *Eve* (13 Eq. 450).

Relief barred.

(28) In the absence of special agreement, a judgment or award against the principal debtor is *res inter alios acta*, and does not bind the surety: *Ex p. Young* (17 Ch. D. 668).

(29) On a merely joint guarantee a judgment against S. is a bar to an action against the co-sureties: *Kendall* v. *Hamilton* (4 A. C.

504); *In re Hodgson* (31 Ch. D. 177), *McLeod* v. *Power* ([1898] 2 Ch. 295); unless the first judgment is a judgment upon a collateral security, *e.g.* a cheque: *Wegg Prosser* v. *Evans* ([1895] 1 Q. B. 108), overruling *Cambefort* v. *Chapman* (19 Q. B. D. 229).

(30) A release of the whole joint and several debt to one joint and several debtor (S.) releases the other debtors (co-sureties): *Cheetham* v. *Ward* (1 B. & P. 630); *Nicholson* v. *Revill* (4 Ad. & E. 675); *Commercial B. of Tasmania* v. *Jones* ([1893] A. C. 313); *Mercantile B. of Sydney* v. *Taylor* ([1893] A. C. 317); *In re E. W. A.* ([1901] 2 K. B. 642); *secus* where rights are reserved against the co-debtor: *ib.*, per Collins, L.J.; or where the joint liability has ceased before the release, *e.g.* by bankruptcy: *Ex. p. Good* (5 Ch. D. 46), *In re Wolmershausen* (62 L. T. 541).

Contract void *ab initio.*

(31) A contract of suretyship was annulled in *Williams* v. *Bayley* (L. R. 1 H. L. 200), because it was made under fear that the surety's son would be prosecuted.

(32) In *Davies* v. *London and Provincial Ins. Co.* (8 Ch. D. 469) similar circumstances existed, but the principal creditor knew that the fear was groundless. This contract was annulled on the ground of non-disclosure. Fry, J., said, that although suretyship is not a contract *uberrimæ fidei*, "very little is sufficient" to avoid it where, as here, it is voluntary.

Discharge of surety.

(33) During the continuance of the security there is a continuing obligation on C. to disclose material facts to the surety: *Phillips* v. *Foxall* (L. R. 7 Q. B. 666)†.

(34) Non-execution by a co-surety: *Cooper* v. *Evans* (4 Eq. 45)†; *Fitzgerald* v. *McCowan* ([1898] 2 Ir. R. 1); a release to D.'s estate: *Pledge* v. *Buss* (John 663), see (30) *supra;* a partial release to a co-surety: *Ellesmere Brewery Co.* v. *Cooper* ([1896] 1 Q. B. 75); action by the creditor implying abandonment of the contract with the debtor: *Hewison* v. *Ricketts* (71 L. T. 191) (contrast *Barber* v. *Mackrell* (68 L. T. 29)); distraint by C. on D.'s assets mortgaged to C.: *Pearl* v. *Dixon* (1 D. & J. 461); sale by C. and D. of material part of security: *Holme* v. *Brunskill* (3 Q. B. D. 495); *Polak* v. *Everett* (1 Q. B. D. 669);—unless contemplated by the contract: *Taylor* v. *N. S. Wales B.* (11 A. C. 596); or unless the security was valueless: *Rainbow* v. *Juggins* (5 Q. B. D. 422);—and *lâches* by C. unless harmless to S.: *Carter* v. *White* (25 Ch. D. 666); unavoidable: *Caxton* v. *Dew* (80 L. T. 325); or due to D.'s vice against which S. guaranteed: *Kingston* (*Mayor*) v. *Harding* ([1892] 2 Q. B. 494), produce the same effect.

(35) Arrangements by C. and D. to the prejudice of S. release S. But not appropriation by C. of payments by D.: *In re Sherry* (25 Ch. D. 702); nor acceptance of payment which afterwards has to be refunded: *Petty* v. *Cooke* (L. R. 6 Q. B. 790).

(36) Consolidation of mortgages is such an arrangement: *Bolton* v. *Buckenham* ([1891] 1 Q. B. 278); *Bolton* v. *Salmon* ([1891)] 2 Ch. 48); see (18), and *ante*, p. 260.

By contract to give time.

(37) "If you agree with the principal to give him time, it is contrary to that agreement that you should sue the surety, because if you sue the surety you immediately turn him into the principal, and therefore your act breaks the agreement into which you have entered with the principal:" per Lord Hatherley, in *Oriental Financial Corp.* v. *Overend, Gurney & Co.* (7 Ch. 150). Such contract to give time must be binding, and must be with D. and not S.: *Clarke* v. *Birley* (41 Ch. D. 422), and by C. and not S.: *Greenwood* v. *Francis* ([1899] 1 Q. B. 312); and it makes no difference that S. was formerly co-principal, if the creditor knows that he is now surety: *Rouse* v. *Bradford Banking Co.* ([1894] A. C. 586).

(38) In *Bolton* v. *Buckenham*, *Bolton* v. *Salmon* (*supra*), the date of redemption was altered, and S. was discharged.

(39) In *Rouse* v. *Bradford Banking Co.* (*ubi supra*) the original agreement was to guarantee an overdraft of £50,000. Permission to increase this overdraft to £53,000 for a limited period was not held to discharge the surety. Nor was he discharged by a subsequent reduction of the overdraft to £45,000, followed by a subsequent collateral contract for value to honour bills to the extent of £10,000.

(40) S. is liable if he contracted himself out of this right beforehand, *ib.* ([1894] 2 Ch. 32), per Lindley and A. L. Smith, L.JJ.; *Whiting* v. *Burke* (6 Ch. 342); or contemplated this course of business at the date of contract: *Redman* v. *Swire* (1 Q. B. D. 536); *Taylor* v. *N. S. Wales B.* (*supra*).

Effect of discharge.

(41) When the surety is discharged, securities given by him are released also: *Bolton* v. *Salmon* ([1891] 2 Ch. 48).

NOTE ON SUBROGATION.

Subrogation confers on S. as against D. the same rights as though he were assign of C. S. stands in C.'s shoes. The right is acquired by S. having discharged some liability under which D. lay to C. Instances are given (pp. 210, 296). The case of surety (= S.), creditor (= C.), and debtor (= D.), and the mutual rights of co-sureties are also instances.

It has been recently discussed whether, if S. is a bank, D. a company which through its directors illegally borrow from it, and C. the legal creditor of D. whom S. pays (or whom D. pays with S.'s money), S. is subrogated to C. Authorities differed. Lord Selborne held that in such a case D. had not illegally borrowed from S. Equity regards the substance, not the form. D. had really contracted a legal debt to S., S. was therefore a common creditor of D.: *Blackburn B. Soc.* v. *Cunliffe* (22 Ch. D. 61, 71). Lord Blackburn's language pointed to subrogation, *S. C.* (9 A. C. 857, 866); so did Fry, L.J.'s in *Wenlock* v. *River Dee Co.* (19 Q. B. D. 155, 165). In these and other cases the question was purely academic. But a case arose in which C. was a preferred debenture stockholder. In this case, if S.'s money was applied to paying off C., S. would obtain greater rights against D.

than if the borrowing from S. had been legal. The absurdity of this conclusion led the C. A. to hold that in the cases quoted "the discharge of the liabilities of the company to those creditors validated the overdraft of the company on the banking account to the extent of the moneys so applied;" that there was no subrogation, and that S. did not succeed to C.'s priorities, equities, or securities as against D.: *In re Wrexham Ry. Co.* ([1899] 1 Ch. 440)*. See, too, *In re Cork, etc., Ry. Co.* (4 Ch. 748); *Portsea Island B. Soc.* v. *Barclay* ([1895] 2 Ch. 298).

Subrogation entitles S. not only to C.'s right of action, but to all benefits accruing to C. from any source in respect of the matter in respect of which subrogation arose, *Castellain* v. *Preston* (11 Q. B. D. 380),* and to rights renounced by C., *West of England Fire Ins. Co.* v. *Isaacs* ([1896] 2 Q. B. 377). These two cases were cases of fire insurance moneys, etc.

Life Insurance.

In re LESLIE: LESLIE *v.* FRENCH.

(23 CH. D. 552.)

Principle.

A stranger or a part owner of a policy of life insurance cannot acquire a lien on the proceeds of the policy for premiums paid by him except (1) *by contract,* (2) *as trustee,* (3) *as mortgagee,* (4) *by subrogation.*

Summary of facts.

A widow, after effecting a policy on her own life for £5000, married Mr. Leslie, and handed the policy to him. Subsequently, Mr. Leslie covenanted to pay £6000 on the death of his wife to trustees on the trusts of his daughter's marriage settlement, assigned the policy to the trustees as security, and covenanted with them to pay the premiums during the life of his wife. Mr. Leslie, and after his death his executors, paid the premiums. His estate was not entitled to a lien on the policy for the premiums so paid.

Lien or charge created:

In this case Fry, J., said that the authorities established that a lien on policy moneys for premiums paid by a mere stranger or part owner arises in only four cases. It is obvious that the second and third are subdivisions of the first class of cases (*ante*, pp. 207, 230). The fourth class is a mere pendant to the second and third classes, just as *Aylwin* v. *Witty* (see below) is a pendant to the first class. As, however, Fry, J.'s, classes have been quoted in nearly every succeeding case, we will keep them, transposing only the third and fourth classes. They are as follows:—

(1) By contract;

(1) By contract with the beneficial owner. In *Aylwin* v. *Witty* (30 L. J. Ch. 860), a mortgagor of a policy contracted with a mortgagee to pay the premiums, and the sureties to the mortgagor paid the premiums; the sureties were entitled to a lien on the principle that the contract of suretyship entitled them to all the mortgagee's securities.

(2) By payment by trustees;

(2) By reason of the right of trustees to indemnity out of their trust property for money expended by them in its preservation. If trustees have money in hand to pay premiums, they cannot by borrowing money for that purpose burden the property with a lien: *Clack* v. *Holland* (19 Beav. 262); but must pay premiums in the first place, out of income apportioning the liability between tenant for life and remainderman, as in *In re Morley* ([1895] 2 Ch. 738) (order). Where they have no money in hand they must borrow, and so create the lien (*ib.*), or with the leave of the Court surrender, *Beresford* v. *B.* (23 B. 292); or sell it, *Hill* v. *Tremery* (23 B. 16); *Steen* v. *Peebles* (25 L. R. Ir. 544); "the right of a trustee to an indemnity is confined to indemnity out of his trust fund:" *In re Winchilsea's Policy T.* (39 Ch. D. 168), cited *ante*, p. 210.

(3) Or mortgagees;

(3) By reason of the right of a mortgagee to add to his charge any money paid by him to preserve his property.

(4) By subrogation to trustees;

(4) By subrogation or substitution; thus a person who, at the request of a trustee, has advanced money for the preservation of the property is allowed to stand in his place and succeed to his right of indemnity. In *Gill* v. *Downing* (17 Eq. 316) trustees had, but did not use, their power of paying premiums which the mortgagees of the reversion paid unasked during the subsistence of the prior life estate. Fry, J., referred this case to this class. See *Burridge* v. *Row*, *Todd* v. *Moorhouse*; *In re Pumfrey*, etc., cited p. 210.

or mortgagees.

Fry, J., only referred to subrogation to the rights of a trustee; but cases have been argued on the assumption that subrogation to the rights of a mortgagee has the same effect. Thus, in *Falcke* v. *Scottish Imperial Ins. Co.* (34 Ch. D. 234), followed by *In re Winn* (57 L. T. 382), the mortgagor paid premiums at the request of an alleged agent of the mortgagee; but it was held that he was not the mortgagee's agent for this purpose. Fry, L.J., doubted, however, "whether a mere request by a mortgagee to his mortgagor . . . would create a lien as against the mortgagee upon the property saved by the payment" (p. 252). Compare *Saunders* v. *Dunman* (7 Ch. D. 825).

In *Strutt* v. *Tippett* (62 L. T. 475) A. B. mortgaged land and a policy to C. D., and assigned the land to E. F.; C. D. threatened foreclosure if E. F. did not pay the premiums; E. F. paid the premiums and claimed a lien on the policy money against A. B., but without success. Chitty, J., assumed that a request from C. D. would have entitled E. F. to a lien by subrogation from the mortgagees, but a threat was not a request. The C. A. upheld his decision on different grounds.

A possible addition to these four classes.

In this case, Lindley, L.J., suggested a possible addition to Fry, J.'s, four classes: "If an owner of onerous property agrees with me to indemnify me or my property from the burdens on the onerous property, and the owner makes default, and I or my property have to bear those burdens, I am inclined to think that I should have as against the owner of the onerous property a lien on it for the money expended by me in bearing that burden, which as between him and me he ought to bear."

These classes are exclusive.

Except in the cases referred to, no lien could, according to Fry, J., arise; but the principle of "confusion" would apply. Fry, J., stated the principle thus in the l.c.; "If I pour my gold into your heap, or put my silver into your melting pot, or turn my corn into your granary, I have no right to an account or any relief against you, but on the contrary I have actually transferred the property in what was mine to the person with whose property I have mingled it."

Three arguments overruled in the l.c.

Three suggestions had been made on Mr. Leslie's behalf to avert the application of this principle.

(1) Renewal of leaseholds.

First, that he was in a similar position to a tenant for life, whose estate, if he renews leaseholds and dies before the expiration of the renewal, is entitled to a lien on the interests in remainder, proportionate to the unexpired portion of the renewed term. But this equity is *sui generis* and does not arise in any other circumstances. Thus as a rule a tenant for life of an insurance policy will acquire no lien by paying premiums: *In re Waugh's T.* (46 L. J. Ch. 629).

(2) Acquiescence.

Secondly, it was alleged that a lien had arisen through acquiescence on the part of the real owners in expenditure by a stranger upon this property. But such acquiescence only gives rise to lien when the expenditure is made by a stranger who believes he is owner, and the real owner knows of the mistake.

(3)Salvage.

Thirdly, it was suggested that there was salvage. In *Falcke* v. *Scottish Imperial Ins. Co.* (34 Ch. D. 234) it was finally decided that the analogy of salvage to cases of this kind was wholly misleading. Indeed, Bowen, L.J. (forgetting *Greer* v. *Young*), said of salvage, "No similar doctrine applies to things lost on land nor to anything except ships or goods in peril at sea;" and Fry, L.J., relegated it to the other side of the Irish Channel, whence, he said, it came in 1852.

Debtor and creditor.

Difficult questions often arise where a creditor insures the life of his debtor. One line of cases establish the inference that he receives the policy-moneys merely as mortgagee, the other that he receives them as owner.

The first line of cases is represented by *Courtenay* v. *Wright* (2 Giff. 337), *Drysdale* v. *Piggott* (8 D. M. & G. 546), *Lea* v. *Hinton* (5 D. M. & G. 823), and *Lewis* v. *King* (44 L. J. Ch. 259). Their principle may be summed up thus—

Where the relation of debtor and creditor subsists, and the policy of assurance was effected by the creditor as a security or indemnity, if the debtor directly or indirectly provides money to defray the expense of that security he is entitled to have the security delivered up to him when he pays his debts. This is an application of the maxims, *Qui sentit onus sentire debet et commodum*, and *Secundum naturam est commoda cujusque rei eum sequi quem sequuntur incommoda*. But if the debtor does not directly or indirectly pay the premiums he is not entitled to the policy on satisfaction of the debt: *Bruce* v. *Garden* (5 Ch. 32), cited in *Salt* v. *Northampton* ([1892] A. C. 16).

Annuity cases.

The second line of cases is represented by *Gottlieb* v. *Cranch* (4 D. M. & G. 440), *Knox* v. *Turner* (5 Ch. 515), *Preston* v. *Neele* (12 Ch. D. 760). In these cases there was the grant of an annuity with a right of repurchase, and the grantee effected an insurance on the life of the grantor by way of security; and the law was summed up as follows:—

The mere circumstance that a purchaser of an annuity insures the life on which the annuity depends, does not give to the person or estate that pays the annuity an interest in the policy. In that simple state of things the policy belongs merely to the person who has chosen to effect it for his own protection or advantage. It often happens that when an annuity is purchased the amount of the annuity, or the price to be given, is fixed on the principle of obtaining for the purchaser a certain amount per cent. for his purchase-money, and enough also to insure on the ordinary terms the life on which the annuity depends.

Both these lines of cases present the same sort of difficulty as the cases which decide that a purchaser, or mortgagee, does or does not become entitled to vendor's fire insurance moneys: *Rayner* v. *Preston* (18 Ch. D. 1)†; *Castellain* v. *Preston* (11 Q. B. D. 380)*; *ante*, p. 295, *post*, p. 347. Compare *ante*, p. 267.

Payment into Court.

The *Life Assurance Act* of 1896, S. C. Fund Rules, 1894, 41A., and R. S. C., O. 54C., enables a company to pay money into Court if "in the opinion of their board of directors no sufficient discharge can be otherwise obtained." They would probably have to pay costs if no question of difficulty presented itself: *In re Carroll's Policy* (29 L. R. Ir. 86). There were two rules before that date. Thus before 1874 they could not pay money into Court unless it was held on a trust, *Matthew* v. *Northern Ass. Co.* (9 Ch. D. 80)†; *In re Rosier's T.* (37 L. T. 426), and the company had to interplead. Under the *Judicature Act*, 1873, s. 25, sub-s. 6, they might interplead or pay the money into Court under the *Trustee Relief Act*. But this sub-sect. only applied to assignments under the Act, not, *e.g.*, to assignments in equity (*ante*, pp. 23, 24), nor to assignments by operation of law: *In re*

Sutton's T. (12 Ch. D. 175). Where this sub-sect. applied the rule in *Matthew* v. *Northern Ass. Co.* did not apply, and *vice versâ.* The Act of 1896 removed these difficulties.

Policies of Assurance Act, 1867, makes policies assignable on notice being given.

The *Policies of Assurance Act*, 1867, s. 1, anticipating the *Judicature Act*, 1873, s. 25, sub-s. 6, enacts that assigns and others entitled in equity to give to the assurance company a receipt for the insurance moneys may sue at law in their own names to recover such moneys.

By sect. 3 such right to sue does not accrue until a written notice of the date and purport of such assignment has been given to the company, and the date on which such notice is received regulates the priority of all claims under any assignment: and a payment *bonâ fide* made in respect of any policy by any assurance company before the date on which such notice is received is as valid against the assignee giving such notice as if the Act had not been passed.

By sect. 5 the assignment may be made either by indorsement or by a separate instrument in the words or to the effect set forth in the schedule. A mortgagee by deposit may not give notice to the company after mortgagor's death and demand insurance money as of right: *Crossley* v. *City of Glasgow Life Ass. Co.* (4 Ch. D. 421); *Webster* v. *British Empire Mutual L. A. Co.* (15 Ch. D. 169); *Curtius* v. *Caledonian, etc., L. I. Co.* (19 Ch. D. 534). An agreement to assign upon request is not an assignment within the meaning of the Act: *Spencer* v. *Clarke* (9 Ch. D. 137).

It was held in *Newman* v. *N.* (28 Ch. D. 674) that a first incumbrancer who had not given the statutory notice was not to be postponed to a second incumbrancer who, having had notice of the prior charge, had given the office the statutory notice. The statute, the Court said, was not intended to affect the mutual rights of persons claiming the money outside the insurance office; but only to give a simpler remedy against an insurance office, and also to give facilities to insurance offices in settling claims.

A policy expressed to be unassignable is only unassignable at law, *i.e.* under this Act and the Jud. Act, it is assignable in equity: *In re Turcan* (40 Ch. D. 5). The policies of Friendly Societies are assignable at law and in equity: *In re Griffin* (xviii. T. L. R. 142), overruling *In re Redman* ([1901] 2 Ch. 471). 14 Geo. III. c. 48 avoids insurances on the life of any one in whose life the insurer had not at the date of making the insurance an insurable interest up to the amount of the insurance.

Life Assurance Companies Act.

The Life Assurance Companies Acts, 1870 to 1872, enact as follows:—

By sect. 3 of the Act of 1870, which is to be read along with sect. 1 of the Act of 1871, and sect. 1 of the Act of 1872, every company commencing the business of life assurance within the United Kingdom is required to deposit £20,000 in the Court of Chancery, to be returned as soon as its life assurance fund accumulated out of the premiums shall have amounted to £40,000: *Ex parte Scottish Economic Ass. Soc.* (45 Ch. D. 220).

By sect. 4, which is to be read along with sect. 2 of the Act of 1872, the life funds are to be kept separate from the accident or other funds. By subsequent sections annual and other statements are required to be made by life insurance companies. Sects. 14 and 15 prescribe the conditions on which alone amalgamations or transfers are permitted, *ante*, p. 88; *In re Argus Life Ass. Co.* (39 Ch. D. 571); *In re Sovereign Life Ass. Co.* (42 Ch. D. 540). By sect. 21, passed on account of the decision in *In re European Life Ass. Soc.* (9 Eq. 122), the Court may order the winding-up of any company in accordance with the *Companies Act*, 1862, on the application of one or more policy-holders or shareholders, upon it being proved to the satisfaction of the Court that the company is insolvent; and for this purpose contingent liabilities are to be taken into account, but the Court shall not give a hearing to the petition until security for costs is given, and a *primâ facie* case established. Sect. 5 of the Act of 1872 provides for valuing contingent debts, annuities, and policies.

Sect. 22 of the Act of 1870 enables the Court, where a company is proved to be insolvent, to reduce contracts by the company upon such terms and subject to such conditions as the Court thinks just, in the place of making a winding-up order. See *In re Great Britain Mutual Life Ass. Soc.* (20 Ch. D. 351).

Novation.

Sect. 7 of the Act of 1872 dealt with "novation" by policy-holders, which caused so much controversy in the liquidations of the Albert and European Assurance Companies. See Buckley, ed. 7, pp. 403 *et seq.* For the future, no policy-holder of a company amalgamated with or transferred to another shall by payment of premiums or any other acts be deemed to have abandoned any claim against his original company, or to have accepted in lieu thereof the liability of the other company, "unless such abandonment and acceptance have been signified by some writing signed by him or by his agent lawfully authorized."

Insurance for wife and children.

Under sect. 11 of the *M. W. P. Act*, 1882 (nearly identical with the *M. W. P. Act*, 1870, s. 10), a man may insure his life for the benefit of his wife and children, so that the policy moneys are not liable for his debts (unless the objects of the trust fail or murder the insured): *Cleaver* v. *Mutual, etc., L. A. Ass.* ([1892] 1 Q.B. 147); and a woman has similar power to insure her life for the benefit of her husband and children. Policies made before 1883 are under the Act of 1870: *In re Kuyper's P. T.* ([1899] 1 Ch. 38); following *In re Turnbull* ([1897] 2 Ch. 415); *In re Adam's P. T.* (23 Ch. D. 525); and dissenting from *In re Souter's P. T.* (26 Ch. D. 236). A policy for the benefit of wife and children makes the beneficiaries joint tenants: *In re Seyton* (34 Ch. D. 511)†; *In re Davies P. T.* ([1892] 1 Ch. 90). See *ante*, p. 117.

Stamps.

For the stamps on policies of insurances and assignments thereof, see the *Stamp Act*, 1891, ss. 98–100, 104, 117, 118, and Sch. 1.

Contract *uberrimæ fidei.*

A person intending to insure his life must disclose everything material and must answer every question without evasion, otherwise the contract will be set aside: see *London Assurance* v. *Mansel* (11 Ch. D. 363), *Thomson* v. *Weems* (9 App. Cas. 671)†, *Seaton* v. *Burnand* ([1900] A. C. 135). In the former case there was no express declaration that the policy should be void if the answers were untrue. Jessel, M.R., decided the case as though the absence of this express declaration did not matter. But see *Wheelton* v. *Hardisty* (8 E. & B. 232). For the effect of this express declaration, see *Anderson* v. *Fitzgerald* (4 H. L. C. 484), *Hambrough* v. *Mutual Life Ins. Co.* ([1895] W. N. 18).

See, on the subject of insurance generally, Brett's Commentaries, 2nd ed. vol. i. bk. ii. chap. v.; Porter's Law of Insurance, 2nd ed. pp. 351 *et seq.*

The Old Election.

COOPER *v.* COOPER.

(L. R. 7 H. L. 53; S. C. 6 CH. 15.)

CODRINGTON *v.* CODRINGTON.

(L. R. 7 H. L. 854; S. C. 8 CH. 578.)

Principle.

A. cannot accept B.'s gift, of B.'s property, x., by will, and reject B.'s gift of A.'s property, y., made to C. by the same will, but must forfeit y., or compensate C. out of x. This principle extends to A.'s assigns, to B.'s appointments, to gifts partly by deed, partly by will, and to gifts by deeds in which A. makes a void gift, confirming B.'s gift of y. to C.

Cooper v. *Cooper.*

Summary of facts.

W. H. Cooper devised Pain's Hill to trustees and their heirs upon trust after B.'s (his widow) death, to sell the same, and hold the net proceeds in trust for his children as she should before 1852 appoint, and died in 1840. In 1841 B. by revocable deed appointed the said property (*y.*) to her sons A. and C., then by will (1841) appointed it to C. alone. Then A. died intestate, leaving two children D. and E. Then B. by codicil, in 1852, gave D. and E. £2000 (*x.*), contingently, and with powers of interim maintenance. B. died 1863, so that her appointment by will was invalid. D. and E. may not elect to take *y.* as next of kin of A. under the deed of 1841, without compensating C. out of the £2000 (*x.*).

Codrington v. *Codrington.*

By post-nuptial settlement, in 1852, H. B. and his wife, A., assigned to their trustees (C.) 80,000 S.Rs. (*y.*) to which A. was entitled, subject to certain life interests; B. assigned £5000 and A.'s father £400 p.a. to the trustees (C.), who were, *inter alia*, to pay £200 p.a. (*x.*), and the income of the 80,000 S.Rs., when received, to A. for her separate use without anticipation. In 1864 there was a decree *nisi* for divorce, made absolute in 1865, against A. In 1871 the 80,000 S.Rs. fell into possession. A. may not elect to take the 80,000 S.Rs. (*y.*) absolutely, without compensating C. out of *x.*, *i.e.* her £200 a year, received since 1864, and out of her other interests under the settlement.

Meaning of Election, Forfeiture, and Compensation. These two cases push to their last consequences the doctrine of Election which was first imported into English law in the cases selected by White & Tudor (L. C. i. 414, 416) as their leading cases: *Noys* v. *Mordaunt* (1706) and *Streatfield* v. *Streatfield* (1735). The doctrine was borrowed more directly than any other principle in equity from Roman Law, where, however, it was only applied to wills. *x.*, if we may adopt the formula in the headnote, must be property of which B. can "freely dispose:" per Lord Loughborough, *Bristow* v. *Warde* (2 V., jun., 350). And the Court either regards him as giving *x.* as a conditional gift intended as such by him; that is to say, B. means A. to take *x.* upon condition that he allows C. to take *y.* This was the case in *Noys* v. *Mordaunt.* "In every case of election," said Lord Eldon, *Thelusson* v. *Woodford* (13 V. 221), "there must be an intention to dispose of that over which that person has no power of disposition." In these cases B. may be said to make a mistake with his eyes open, an intentional mistake as to his powers of disposition. "An assumption of power to give what a testator knows not to belong to him is at least as much a ground of election as a disposition of what he has mistakenly conceived to be his own," per Sir W. Grant, *Welby* v. *W.* (2 V. & B. 187, 199): *Whistler* v. *Webster* (2 V. jun., 367). Or else B. errs by accident: he believes that he owns or can dispose of *y.*; and the Court relieves him against a mistake of fact—in the sense of *Cooper* v. *Phibbs* (*ante*, p. 90)—by interpreting the document as a whole, by reading the gifts as mutually conditioning one another, and by insisting so far as it can that one part of the document shall not stand without the other. A. shall not "approbate and reprobate" it—shall not be against it in order to claim "*y.*," and be for it in order to claim "*x.*" He shall not blow hot and cold.

Cases in which compensation arises.

It does not matter whether B. "does or does not know that he has no right to dispose of the property in respect of which the election has to be made:" Watson, Comp. of Eq., 2nd ed. pp. 177–78; whether the mistake is wilful or unintentional, the effect is the same. A.'s election to accept *x.* operates as an out-and-out forfeiture of *y.*: no question of compensation arises in this case: *In re Lord Chesham* (31 Ch. D. 466). But if A. elects to accept *y.*, the trustees must impound *x.*, or have a lien on *x.*, *Pickersgill* v. *Rodger* (5 Ch. D. 163), in so far as is necessary to compensate C. for the loss of *y.* This right to impound *x.* being an equity arising under the settlement is paramount to any incumbrance upon it created by A.—for the reason illustrated, pp. 216 *et seq.*

Election distinguished from choice.

So much confusion has arisen over the use of words in connection with this not very intricate subject that the reader is warned that in this and the succeeding chapter, "election" is used in its strict sense as a kind of choice which necessarily entails forfeiture or compensation by the equitable methods of administering trusts or impounding the interests of *c.q.t.* A choice which has not that effect is termed choice.

Cooper v. *C.* is selected as one l.c., in order to illustrate (1) the kind of property, (2) the kind of deed or will with respect to which election arises, and (3) the effect of assignment of the elector's interest. *Codrington* v. *C.* is meant to throw light on (4) the nature of election and the knowledge which it presupposes, (5) the capacity to elect, (6) the contrast between ratification and election.

I. Kinds of property.

(1) Either *x.* or *y.* may be "interests immediate, remote, contingent, of value and not of value:" per Lord Loughborough, *Wilson* v. *Townsend* (2 V., jun., 697). There is "no distinction between personal estate and real estate, between specific and residuary legatees, or between legatees and next of kin of an intestate:" per James, L.J. (6 Ch. 21). "Every species of right," per Lord Redesdale, *Birmingham* v. *Kirwan* (2 Sch. & L. 451).

(2) Realty bought after a will, *Jacob* v. *J.* (78 L. T. 825), or devised to an heir before the Wills Act: *Thelusson* v. *Woodford* (13 V. 209); *Welby* v. *W.* (2 V. & B. 187); Dower, *Parker* v. *Sowerby* (4 D. M. & G. 321), citing *Birmingham* v. *Kirwan*.

(3) Guardianship, *Blake* v. *Leigh* (Amb. 305); remainder after an

estate tail: *Webb* v. *Shaftesbury* (7 V. 480); *Graves* v. *Forman* (cited 3 V. 67).

Appointments.

(4) Property which A. can appoint under a general power, *Griffith-Boscawen* v. *Scott* (26 Ch. D. 358), or subject to (5)–(10) under a special power: *Whistler* v. *Webster* (2 V., jun., 367).

(5) Special appointments, if invalid because too late, *Cooper* v. *C.*; or too soon, *Hume* v. *Rundell* (2 S. & St. 174); or by deputy, *Ingram* v. *I.* (1 V. 259, 2 Atk. 88); or under a non-existent power, *In re Brooksbank* (34 Ch. D. 160); or partly to wrong persons, *Whistler* v. *Webster*, *In re Wheatley* (27 Ch. D. 606); or with charges in their favour, *White* v. *W.* (22 Ch. D. 555); or partly of wrong property: *Coutts* v. *Acworth* (9 Eq. 519).

(6) A special appointment, if invalid because of trusts, conditions, directions, *Churchill* v. *C.* (5 Eq. 44), or agreements, *Roach* v. *Trood* (3 Ch. D. 429), annexed to it, *ante*, p. 183; or if in violation of the rules against perpetuities, *Wollaston* v. *King* (8 Eq. 165, 175); *In re Warren's T.* (26 Ch. D. 208); but see *Tomkyns* v. *Blane* (28 B. 422), does not give rise to election.

(7) Invalid dispositions, including appointments invalid under r. (5), will be construed (if possible) as not having been made; the principle "ut res magis valeat quam pereat" being inapplicable to these clauses. Recitals have been construed as dispositions of *y.*, *Cooke* v. *Briscoe* (1 Dr. & W. 615); *Walpole* v. *Conway* (Barn. 153); *Vane* v. *Dungannon* (2 Sch. & L. 118); but see *Dashwood* v. *Peyton* (18 V. 27); as is the case where election is not involved: *In re Rowe* ([1898] 1 Ch. 153), citing *In re Aird's E.* (12 Ch. D. 291); *Wilson* v. *Morley* (5 Ch. D. 776). Any little vagueness is held to imply that a disposition of others' property was not meant: *A.-G.* v. *Lonsdale* (1 Si. 105); *Church* v. *Kemble* (5 Si. 525). For residuary, universal, and specific gifts by will, see Theobald, pp. 96 *et seq.*

(8) Therefore "it is difficult to apply the doctrine of election where the testator has some present interest in the estate disposed of though it may not be entirely his own:" per Eldon, L.C., *Rancliffe* v. *Parkyns* (6 Do. 149, 185); but see *Codrington* v. *C.*, *Synge* v. *S.* (9 Ch. 128). Compare Jessel, M.R.'s, dictum: *Pickersgill* v. *Rodger* (5 Ch. D. 170, 171); *Minchin* v. *Gabbett* ([1896] 1 Ir. R. 1).

(9) "*x.*" includes property which B. may freely dispose to the same objects, *e.g.* by special appointments, *England* v. *Lavers* (3 Eq. 63); *In re Wells' T.* (42 Ch. D. 646); but if so the special appointments must be under the same power: *In re Fowler's T.* (27 B. 362); *In re Aplin's T.* (13 W. R. 1062); *Trollope* v. *Routledge* (1 D. & S. 662).

Two clauses in one document.

(10) If A. takes under a clause in default of appointment or residuary or other clause in the document containing the invalid appointments, A. does not claim adversely to the document, and there is no election: *Wollaston* v. *King* (8 Eq. 165); *Wallinger* v. *W.* (9 Eq. 301); *In re Swinburne* (27 Ch. D. 696).

(11) If B. makes two gifts of his own property, one (*a*) beneficial

and the other (*b*) onerous, is this a gift of "a" subject to an implied condition that as between donees "a" as well as "b" shall discharge the *onus* on "b"? Yes, if the two gifts are really one aggregated gift. Fry, J., stated in *Guthrie* v. *Walrond* (22 Ch. D. 573, 577): "that when two distinct legacies or gifts are made by will to one person, he is as a general rule entitled to take one and reject the other, but that his right to do so may be rebutted if there is anything in the will to show that it was the testator's intention that that option should not exist." The two gifts are really one, if the uses and trusts are as nearly the same as the natures of "a" and "b" admit, but even then the Court "might discover some subtle indication of an intention that the legatee should be at liberty to take part of the gift and leave the rest:" *Frewen* v. *Law Life Ass. Co.* ([1896] 2 Ch. 511); *In re Hotchkys* (32 Ch. D. 408); *Syer* v. *Gladstone* (30 Ch. D. 614); *In re Lord Kensington* (xviii. T. L. R. 89).

II. Kinds of documents.

(12) A.'s claim, which is adverse to B.'s settlement or will, may arise under "voluntary deeds," contracts for value "resting in articles" or "executed by conveyance and assignment:" per Lord Selborne (8 Ch. 587), citing the authorities since incorporated into White and Tudor (i. 433). But it arises more rarely under deed "because deeds being generally matters of contract, the contract is not to be interpreted otherwise than as the consideration which is expressed requires:" per Lord Redesdale, cited 8 Ch. 587.

(13) One document, whether will or deed, must dispose both of *x.* and *y.* A will and codicils, *Cooper* v. *C.*, two settlements on one marriage, *Bacon* v. *Cosby* (4 D. & S. 261); *Hamilton* v. *H.* ([1892] 1 Ch. 396), a will and settlement recited therein, *Cooke* v. *Briscoe* (1 Dr. & W. 596), *Bizzey* v. *Flight* (3 Ch. D. 269), are one document.

(14) A. may claim *y.* as heir of quasi-entailed personalty: *Mosley* v. *Ward* (29 B. 407), as next of kin of converted realty, *Cooper* v. *C.* as beneficiary under articles in supposed pursuance of which the document putting him to election was made: *Streatfield* v. *S.*, under B.'s will, *Bigland* v. *Huddleston* (3 Bro. C. C. 286), etc., see (1). The title must be *dehors* and adverse to the document creating election. See (10, 11).

III. Effect of assignment.

(15) A.'s election binds those taking beneficially through A., *Sadleir* v. *Butler* (1 Ir. R. Eq. 415). If B.'s will puts A. or his assigns to election, the first date at which election can take place is B.'s death; in the case of a deed, the first date is the date of the deed.

(16) If A. dies after he can elect (*a*) without electing and leaves *x.* and *y.* to F., F. must elect, *Savill* v. *S.* (2 Coll. 721); *In re Hewson* (23 L. J. Ch. 256), or (*b*) if A. elects, or (*c*) not being liable to elect does not elect, and leaves *y.* to F., who takes *x.* from B., F. need not elect: *Brown* v. *B.* (2 Eq. 481), citing *Campbell* v. *Ingilby* (21 B. 567); *Grissell* v. *Swinhoe* (7 Eq. 291; cited L. R. 7 H. L. 76); *Cavan* v. *Pulteney* (2 V. jun. 544; cited L. R. 7 H. L. 69).

(17) If A., being liable to elect, dies before he can elect and leaves *y.* to F., who takes *x.* from B., F. must elect: *Cooper* v. *C.*

(18) If A., being B.'s son, dies before B., leaving children D. and E.,

B.'s gift by will to A. is read as though A. survived B.: *Pickersgill* v. *Rodger* (5 Ch. D. 163); *Wills Act*, 1837, s. 33. Further, let x. be realty, y. personalty, and let D. take x., E. take y. from A. Then D. can only take x. charged in favour of C. with y. (*ib.*).

(19) If A. assigns y. to a purchaser for value (P.), and continues to enjoy x., and then dies, C. and his assigns may claim against A.'s estate compensation to the value of x.; *i.e.* may claim the value of x. or y., whichever is least: *Rogers* v. *Jones* (3 Ch. D. 688); comp. *Middleton* v. *Windross* (16 Eq. 212).

(20) If A. has a life interest in x. and y., A.'s election binds only that life interest: *Ward* v. *Baugh* (4 V. 623).

(21) If A. does not elect (at any rate so as to bind remaindermen), A.'s legatees or devisees (or the remaindermen), elect each with regard to his beneficial interest: *Fytche* v. *F.* (7 Eq. 494); *Dillon* v. *Parker* (1 Sw. 359).

IV. Nature of election.

(22) Knowledge that A. is entitled to y. adversely to B., and to x. and y. under B., and that he cannot claim both under and against B.; *i.e.* knowledge of his rights and knowledge of the law of election, is necessary; otherwise A. does not elect: *Spread* v. *Morgan* (11 H. L. C. 588, 602, 611, etc.)*.

(23) If A. "elects to take both," that shows that he does not know the law of election, and therefore does not elect: *Dillon* v. *Parker* (1 Sw. 359)*.

(24) Election from conduct will not be presumed so long as x. or y. is reversionary: *Padbury* v. *Clark* (2 Mac. & G. 298); *Codrington* v. *C.* Election cannot effect a forfeiture of reversionary property which the elector is incompetent to dispose of either at common law or in equity: *Williams* v. *Mayne* (Ir. Rep. 1 Eq. 519).

(25) "Election by conduct must be by a person who has positive information as to his rights to the property and with that knowledge really means to give that property up:" per James, L.J., *Wilson* v. *Thornbury* (10 Ch. 239).

(26) In *Fytche* v. *F.* (7 Eq. 494), 10 years', in *In re Vardon's T. infra*, p. 309, 23 years', in *Sopwith* v. *Maughan* (30 B. 235), 16 years', enjoyment; in that case, and in *Codrington* v. *C.*, and *Hamilton* v. *H.* ([1892] 1 Ch. 396, 408), bringing an action adverse to a settlement was not enough to raise an influence of election against it. *Semble* an action for specific performance by the elector is election, *Barrow* v. *B.* (4 K. & J. 409).

(27) A. may be compelled by action to elect. Conversely A. may bring an action in order to obtain the knowledge necessary to enable him to elect: *Douglas* v. *D.* (12 Eq. 617, 637 *et seq.*).

V. Capacity. Infants.

With regard to election by infants, the usual practice is to direct an inquiry what would be most beneficial to the infant: *Brown* v. *B.* (2 Eq. 481). In other cases, the Court has elected for the infant without a reference to Chambers: *Blunt* v. *Lack* (26 L. J. (N.S.) Ch. 148); *In re Montagu* ([1896] 1 Ch. 549) (order); Seton, 5th ed. p. 1343. When the persons to elect are unborn, the Court elects for them after an inquiry, if it be deemed necessary. In *Streatfield* v. *S.* the Court ordered the infant to elect on attaining 21. See Serrel, p. 184 *et seq.*

Lunatics.

The Court elects for lunatics, *In re Sefton, Earl of* ([1898] 2 Ch. 378), where the condition was express. It only possesses this power *quâ* guardian of lunatics. Compare *Wilder* v. *Pigott* (22 Ch. D. 264).

Married woman under the old law.

In *Cooper* v. *C.* the Court directed an inquiry as to whether election to take or not to take was for the married woman's benefit. On this point the House of Lords reversed the C. A. because of Mrs. Dashwood "who is a married woman, and who cannot make an election for herself:" per Lord Cairns (p. 67). Lord Cottenham, *Frank* v. *F.* (3 My. & Cr. 171), and perhaps James, L.J., *Tussaud* v. *T.* (9 Ch. D. 363), held the same view as Lord Cairns. In *Codrington* v. *C.* the order bound her property as from the date of her emancipation; but her property was restrained from anticipation, a fact which, owing to bad reporting, was kept out of sight. In *Griggs* v. *Gibson* (1 Eq. 685), where there was an express conditional bequest, election took place in Court (*ib.* 692), and the minutes declared her election to be for her benefit (S. C. 14 W. R. 514). Again, in *Barrow* v. *B.* (4 K. & J. 409) when discovert she was held bound by a decree for specific performance which she had obtained while covert. But this case resembles those divorce cases in which the Court allows a married woman to deal with her not-separate property, as a "corollary from her right to sue:" the simplest case being the contract of compromise, *Cahill* v. *C.* (8 A. C. 420, 426 *et seq.*)*; *Williams* v. *Bailey* (2 Eq. 731). She elected out of Court in *Ardesoife* v. *Bennet* (2 Dick. 463), a case which, if correctly reported, is incompatible with *Spread* v. *Morgan*, *supra* (22). In *In re Queade's Trusts* (33 W. R. 816), which decided that she could not elect out of Court, Chitty, J., only professed to follow *Willoughby* v. *Middleton* (2 J. & H. 344) (disapproved in *Smith* v. *Lucas* (18 Ch. D. 544)), and was overruled in *In re Vardon's T.* (*post*, p. 309). In *In re Wheatley* (27 Ch. D. 606), Chitty, J., and in *In re Vardon's T.*, the C. A. assumed that she could elect out of Court; but the question whether she should elect in or out of Court was never raised, as it was held, that under the circumstances, no case of election arose. That is to say we have *Cooper* v. *C.*—a decision of the House of Lords—on one side; and on the other side we have—up till the new development of the doctrine since *In re Vardon's T.*—discredited decisions in the Courts of First Instance.

We are therefore thrown back (*a*) on general principles. Jessel, M.R., in *Smith* v. *Lucas* (18 Ch. D. 544), and Lord Selborne in *Cahill* v. *C.* (8 A. C. 426) said that if she could bind the property by her contract, it followed *ex necessitate* that she could bind it by action implying an acceptance or rejection of conditions. (*b*) The analogy of the cases mentioned on pp. 152, 153, leads us to suppose that (1) the Court can dispense with procedure in Court; (2) that she, not the Court (as in the case of infants and lunatics), elects, even when she elects in court; (3) election by a married woman entitled to her separate use can be made as a man makes it, but it only affects property which she can dispose of: *Smith* v. *Lucas*. It is submitted that these results can be relied on, although the path by which they have been arrived at is devious.

VI. These cases distinguished from those in next chapter.

In *Codrington* v. *C.* the wife was no more party to the deed than the law stationer who copied it. Her personality was merged in that of her husband. Her concurrence was null and void. Therefore she took or was deprived of property solely by her husband. He was sole covenantor and assignor. The chief argument of Lord Cairns' was on construction: how to meet Lord Eldon's dictum cited also in (8). Curiously enough, Lord Cairns, pp. 864, 865, referred to her right to "repudiate" or "to ratify" it; but void acts can neither be repudiated nor ratified. The same construction should be adopted in settlements by infants, women, since the *M. W. P. Act:* see *ante*, p. 116, citing s. 19 of the Act.

Anderson v. *Abbott* (23 B. 457) was on all fours with *Codrington* v. *C.* So was *In re Queade's T.* (*supra*); *Griffith-Boscawen* v. *Scott* (26 Ch. D. 358) (wife, *sui juris*, executed the deed for another purpose): *Harle* v. *Jarman* ([1895] 2 Ch. 419; *In re Turner* (66 L. T. 758)). Further, *Barrow* v. *B.*, *Brown* v. *B.*, *Greenhill* v. *N. British Ins. Co.*, may belong to this category. See pp. 314 *et seq.*

In *Seaton* v. *S.* (13 A. C. 61) the facts were similar to those in *Codrington* v. *C.*, but the question of election was not taken. "There is no question here," said Lord Macnaghten, "of election." The sole point decided was that the act of the married lady, though sanctioned by the Court under the *Infants' Settlement Act*, 1855, was void and therefore incapable of ratification at common law.

Practice.

The order, which is given 8 Ch. 593, amended L. R. 7 H. L. 868, was followed by Romer, J., in *Carter* v. *Silber* ([1891] 3 Ch. 553, 564, 565) (overruled ([1893] A. C. 360) on another point).

It is pointed out in Serrell's Equitable Doctrine of Election (p. 3) that, as under the *Judicature Act*, the K.B.D. gives effect to equitable principles, a defendant in an action for the recovery of the land in the K.B.D. might raise as an equitable defence the liability of the plaintiff to elect between two properties. An action to compel the defendant to elect might even be commenced in the K.B.D., election not being one of the matters specially mentioned in sect. 34 of the *J. Act*, 1873, though such an action would probably be transferred. Mr. Serrell's suggestion that an action for damages by way of compensation in a case of election might be sued for in the K.B.D. seems incorrect, as the only remedy for election is to impound the interest of a beneficiary, or a declaration of title. The *J. Act* has not invented new remedies.

The New Election.

In re VARDON'S TRUSTS.

(31 Ch. D. 275.)

Principle.

The doctrine of election is founded on a presumed intention that effect shall be given to every part of an instrument, but this presumption is rebutted where the instrument expresses an intention to the contrary. Election extends to deeds in which the elector makes voidable gifts of his own property.

Summary of facts.

An ante-nuptial settlement was made in 1860 on the marriage of Mr. Walker and Miss Vardon, then an infant, by which £5000 was settled upon trust that the income should be paid to her for her life for her separate use with restraint upon anticipation, and he and she covenanted to settle all after-acquired property upon trusts the effect of which was to give Mr. Walker the first life interest with an ultimate trust in default of children for Mrs. Walker. The question was whether she could take absolutely a legacy of over £8000 bequeathed to her in 1883 for her separate use without compensating out of her life estate in the £5000 the persons disappointed by her refusal to settle the £8000. The C. A. decided that the lady was not put to her election.

Voidable contracts by infants.

In this case there was a settlement by an infant not sanctioned by the Court under the *Infant Settlements Act* (18 & 19 Vict. c. 43), and therefore voidable, since settlements are contracts for the benefit of infants, and are therefore not within the *Infants Relief Act*, 1874 (37 & 38 Vict. c. 62), and are voidable, not void: *Smith* v. *Lucas* (18 Ch. D. 531); *Duncan* v. *Dixon* (44 Ch. D. 211); *Carter* v. *Silber* ([1892] 2 Ch. 278, S. C. nom. *Edwards* v. *Carter* ([1893] A. C. 360)), (citing Bullen and Leake on Pleadings (4th ed. ii. 220); *Ebbett's Case*

(5 Ch. 302) (infants' shares)); *Viditz* v. *O'Hagan* ([1900] 2 Ch. 87, 96, 97). See Pollock on Contracts, 6th ed. pp. 63, 65. Further, "there is no reason for distinguishing a voidable covenant from any other covenant; till it is avoided it is a binding covenant:" per Jessel, M.R., *Smith* v. *Lucas*, at p. 543. See *infra* (5).

Ratification.

Further, when *sui juris* the infant had the right to repudiate or "ratify it, *i.e.* deprive herself of the right to repudiate it:" per Lindley, M.R., *Viditz* v. *O'Hagan* ([1900] 2 Ch. 96); *Davies* v. *D.* (9 Eq. 468); *Edwards* v. *Carter*. But this right was a contractual right. The ratifier must have contractual capacity at the date of ratification: in which case the contract takes place as though it had been entered into *nunc pro tunc*. Now, at common law "a married woman" subject to the old law "is absolutely incompetent to enter into contracts during coverture, and has in contemplation of law no separate existence, her husband and herself forming but one person. . . . The contract with her is not, as in the case of an infant, voidable only, but it is absolutely void:" Benjamin on Sales, cited in Thicknesse, Digest of Law of Husband and Wife, p. 4. Therefore she could not ratify at common law: *Nicholl* v. *Jones* (3 Eq. 696). But in equity she has a quasi-contractual capacity; and her quasi-ratification would affect the property which her quasi-contracts can affect, *Smith* v. *Lucas*, *i.e.* property settled to her separate use including now property which her contracts can affect under the *M. W. P. Acts*. But there is no case of equitable quasi-confirmation, unless the cases *infra*, p. 315, can be construed in that light. The l.c. on common law ratification is *Edwards* v. *Carter* ([1893] A. C. 360)*. There an infant waited three or four years after coming of age, during which period he received £1500 a year from his father under a voidable settlement made on and by him on his marriage when an infant. It contained a covenant to settle after-acquired property, which the infant wished to repudiate as soon as he became entitled to after-acquired property. There was evidence that he did not know of the existence of this covenant. The House of Lords held that (1) for purposes of ratification and repudiation a settlement is one and indivisible; and (2) that he had already ratified it by receiving benefits for three or four years under it; and (3) he could not be heard to say that he was ignorant of its contents, or of the law.

The difference from election of the old type.

Of these three principles, (1) the first is also the very foundation of election. (2) As for the second, two or three months, five or six months, were mentioned as a reasonable period within which to repudiate ([1892] 2 Ch. 285, 288); but time might not in every case be essential. Thus in *In re Jones* ([1893] 2 Ch. 461) a married woman restrained from anticipation, but subject to a protection order, postponed confirmation or repudiation for thirty-eight years; but during that time she never took a penny under the settlement. This was consistent with *Edwards* v. *Carter*. But cases of election are, or were, inconsistent with *Edwards* v. *Carter* in this respect. Thus in *In re Vardon's T.* the married woman had for twenty-three years received benefits under the settlement which she repudiated; *supra*, p. 306 (26). And (3) the third point in *Edwards* v. *Carter* is still more inconsistent with election of the old type; for, as we saw, without knowledge there is no election: see *supra*, p. 306 (22)-(26); so that if a case occurred in which a person might either ratify at common law or elect, election would be useless; for he could ratify without electing, and could not elect without ratifying. In order to prove election knowledge must be proved; not so in order to prove ratification. The less—namely election—would be merged in the greater —namely ratification at common law. And the milder remedy of election would pale its ineffectual fires beside the severer remedy of ratification or repudiation at common law.

New election.

Cases, however, do occur in which the common law remedy is in suspension, equitable quasi-confirmation or quasi-repudiation (if it exists) is unavailable, and in these cases election has been stretched to cover the gap. Of these cases the l.c. is the type. Election to approbate or reprobate is meant to do duty for ratification and repudiation. Not that the l.c. actually held that this was so; it only assumed that this might be so. Thus in *In re Vardon's T.* the voidable gift was made by the elector. There were two instruments; a valid will gave gifts which a voidable deed took away. Mrs. Vardon asked the Court to split the voidable deed in two, and regard its boons made by Mr. Vardon as valid, and its burdens made by herself as void. Unlike *Streatfield* v. *S.*, it was the voidable gift which put her to her election here. The Court assumed without discussion (1) that election by conduct applied to married women owning property to their separate use (see *ante*, p. 307), and (2) to instruments made by the elector.

Two assumptions in the l.c.

That election of the new type is valid;

Equitable approbation or reprobation of voidable instruments—or of voidable terms in instruments—made by the elector is a brand-new invention of equity not fifty years old, and made exclusively for the benefit of married women under the old law—a breed which is rapidly becoming extinct. *Willoughby* v. *Middleton* (2 J. & H. 344) led the new departure (1860) (it has since been overruled), and *Codrington* v. *C.* has been cited in its support (its principle, as we saw, was quite distinct). The assumptions in *In re Vardon's T.* have apparently sealed the triumph of the new election. This invention is said to be a logical extension of the principle that an ante-nuptial like a post-nuptial settlement is by the husband, not by the wife. But that is a fallacy; so far as the wife's funds are settled, they are settled by her, subject to a strictly personal option in the husband to set the settlement aside unless he concurs or acquiesces in it. Chitty, J., said in *In re Hodson* ([1894] 2 Ch. 426) that it was inconsistent to regulate deeds by one's self on one principle, and deeds by another on another principle. But under the former the elector gives, under the latter he receives. In the former equity founds its right to intervene (1) on the existence of a mistake; but in the new election no mistake ever takes place; (2) or in order to enforce a condition imposed upon a gift; but the new election never interposes to enforce the condition of a gift, but always to enforce the consideration or part of the consideration given by the elector. The old election never overlapped, and the new election always overlaps the law of contract. The sole object of the new election is to render invalid consideration, repudiation, or confirmation valid. Not one of the older cases served one of these purposes. Hitherto the only contracts to which the new doctrine of election has been applied are settlements by deed; but it is difficult to see why they should not be extended to any contracts. (3) The new election, if it began with *In re Vardon's T.*, began with a case which established the principle that "election" is only enforced because it represents the "general intention" of the gift. It is not enforced where there is anything in the gift to contradict that general intention. Is it conceivable that it can be the general intention of a voidable gift that it should be unvoidable, when every one knew that it was voidable?

The only discussion was as to anticipation.

Assuming, then, that election can be utilized to produce the same sort of effects as the confirmation or repudiation of voidable instruments by married women, what was the effect if a married woman restrained from anticipation elected to reprobate her instrument?

Two possible answers (1) nature of property;

Two answers were possible: first that "such election is without effect. When election is talked about by equity lawyers it means election productive of forfeiture or compensation. Election which is without effect had better be called by another name, say, 'choice,' then you may say outright that she cannot elect." There was no property on which her choice could operate. This answer seems in harmony with Jessel, M.R.'s train of thought in *Smith* v. *Lucas*. If it had been given, it possibly would not have protected property restrained from anticipation, since the decision in *Hood Barrs* v. *Heriot*, see *ante*, p. 124, and certainly would not have protected such property when the restraint was off; a result, however, which North, J., thought compatible: *Hamilton* v. *H.* ([1892] 1 Ch. 396); Kekewich, J., incompatible: *Haynes* v. *Foster* ([1901] 1 Ch. 361) with the actual decision in the l.c. The principle upon which *In re Vardon's T.* might have been, but was not, decided was illustrated by *In re Lord Chesham* (31 Ch. D. 466). A testator gave certain chattels upon trust for his two sons, and his residue to his eldest son. The chattels were heirlooms which had been settled by deed upon trust to go and be held with a mansion of which the eldest son was tenant for life. Here there was a case for election in the old sense, but as the eldest son chose to take under the will, equity could only order a forfeiture of the heirlooms; but it would not do so, as the interest of the eldest son in the heirlooms was unassignable; nor could it make any order upon the trustees, for such order would have involved a breach of trust. "When he takes under the will there is nothing for him to give up, for there is nothing which he can give up." Consequently it was not election in the strict sense, because it could not effect forfeiture or compensation. It was only choice.

The l.c. was not, *In re Lord Chesham* was decided on this ground;

(2) inten-

The second possible answer was that election was an obligation imposed by an instrument; and if the instrument created, it could cancel the obligation. "There is an obligation," said Lord Hatherley in *Cooper* v. *C.* (L. R. 7 H. L. 53), "on him who takes a benefit under a will or other instrument to give full effect to that instrument under which he takes a benefit." Compare *Pickersgill* v. *Rogder* (5 Ch. D. 163, 166).

of settlement; the l.c. was decided on this ground.

But this obligation was only implied; and the restraint upon anticipation was an express obligation of a contrary character. "The doctrine of election rests not on the particular provisions of the instrument which raises the election, but on the presumption of a general intention in the authors of an instrument that effect shall be given to every part of it, 'the ordinary intent,' to use the words of Lord Hatherley, in *Cooper* v. *C.*, 'implied in every man who affects by a legal instrument to dispose of property, that he intends all that he has expressed.' This general intention is not repelled by showing that the circumstances which in the event gave rise to the election were not in the contemplation of the author of the instrument. It may, however, be repelled by a declaration in the instrument itself of a particular intention inconsistent with the presumed and general intention." The authorities for this proposition were collected on pp. 381 and 394 *et seq.* of *Dillon* v. *Parker* (1 Swan. 359); *Ker* v. *Wauchope* (1 Bli. 25, 40); *Gretton* v. *Haward* (1 Swan. 409, 413, 425 *et seq.*) and by Kay, J., in the Court below (28 Ch. D. 124).

Election is a presumed intention,

"What" asked the C. A., "is the force and effect of this restraint on anticipation? It provides that nothing done or omitted to be done by Mrs. Walker at any given time shall deprive her of the right to receive from the trustees the next and every succeeding payment of the income of the fund as it becomes due. But if she be put to her election, and if by her election she deprives herself of the right to receive subsequent payments of the income until her husband and children are compensated, it follows that she has by the act of election, or by the default in performing her covenant, deprived herself of the benefit of the income in the way of anticipation, which is the very thing which the settlement declares that she cannot do." "This settlement, therefore, in our judgment, contains a declaration of a particular intention inconsistent with the doctrine of election, and therefore excludes it."

Restraint upon anticipation an express intention; therefore the latter prevails over the former.

The principle on which the l.c. was decided was distinguished in *In re Whitwell* ([1890]) W. N. 171), where it was provided that the restraint upon anticipation should not do away with the obligation to elect, and was followed in *Hamilton* v. *H.* ([1892] 1 Ch. 396), where an attempt was made to argue that the restraint against anticipation "during the joint lives of husband and wife" meant "during the intended marriage" (compare *Jones* v. *Westcomb* (1 Eq. Cas. Abr. 245), *In re Akeroyd's S.* ([1893] 3 Ch. 363)), but without success (compare *In re Tredwell* ([1891] 2 Ch. 640)); and also in *Haynes* v. *Foster* ([1901] 1 Ch. 361) dissenting from *Hamilton* v. *H.* on the duration of the protection; see (9) *infra*. In *In re Wheatley* (27 Ch. D. 606),

The l.c. has been followed in this decision.

following *dicta* in *Smith* v. *Lucas* (18 Ch. D. 531), the same view had been taken by the Court of First Instance as that embodied in the l.c. In *In re Wells' T.* (42 Ch. D. 646) the doctrine of general and particular intention was applied to the construction of deeds and wills creating election of the old type.

Examples of the new type of election and of the two assumptions in the l.c.

Election of the new type involves, as we saw, two assumptions; (1) that married women can elect like men; (2) that voidable deeds by the elector give rise to election. The deeds are voidable through infancy, unless the contrary is stated in the following examples:—

(1) In *Campbell* v. *Ingilby* (21 B. 567) Lord Romilly held that the wife was not put to her election.

(2) In *Willoughby* v. *Middleton* (2 J. & H. 344) Page-Wood, V.C., held that she was.

(3) For *Barrow* v. *B.* (4 K. & J. 409), see *ante*, p. 307. *Query:* Was the lady party to the marriage articles? If not, this was election of the type of *Codrington* v. *C.*

(4) In *Brown* v. *B.* (2 Eq. 481) the lady died while married, and without having confirmed the articles. Lord Romilly, M.R., held that the heir was put to his election. If she was party to the articles, the settlement ought, according to common law, to have been valid for all purposes at her death. This point was not taken. *Query* as in (3).

(5) This point was taken in *Burnaby* v. *Equitable Reversionary Soc.* (28 Ch. D. 416), when Pearson, J., held that, "the deed remaining unavoided at the time of the death of this lady" (while married), "it bound her property" (p. 425), and severed a joint-tenancy thereof.

(6) In *Wilder* v. *Pigott* (22 Ch. D. 263) Kay, J., held that the lady had "ratified" her voidable articles by acts. She had (*inter alia*) received benefits thereunder as a *feme sole* for five or six years. "In that view, of course, no case of election arises." He also held that she had "elected during her coverture to confirm the settlement."

(7) In *Smith* v. *Lucas* (18 Ch. D. 531) Jessel, M.R., regarded the right of married women to enter into quasi-contracts so as to bind their separate property as the foundation of their right to "affirm and disaffirm" their voidable contracts. If so they have a right of equitably contracting to confirm and repudiate, which is co-extensive with and a stronger right than the new election, and in presence of which the new election may be disregarded. Further, if the quasi-contracts by married women entitled to a separate use could not effect in equity ratification or repudiation of her ante-nuptial contracts, it is difficult to see how she gets this power (as she does) under the *M. W. P. Acts.* Statute law has added nothing to her contractual power in respect of her past separate property. In this case, and—

(8) In *In re Wheatley* (27 Ch. D. 606) the l.c., and *Viditz* v. *O'Hagan* ([1900] 2 Ch. 87), nothing was decided on this matter.

(9) In *Hamilton* v. *H.* ([1892] 1 Ch. 396) North, J., held that, when the restraint was off and she was a *feme sole*, she could "elect" to reprobate, with the usual consequences. Kekewich, J., interpreted

the l.c. as deciding that no question of election could arise under such a settlement: *Haynes* v. *Foster*. *Query:* Why was not common law repudiation open to her? But North, J., decided this case before Romer, J.'s, decision in *Carter* v. *Silber* ([1891] 3 Ch. 553) was reversed.

(10) In *Greenhill* v. *North British Ins. Co.* ([1893] 3 Ch. 474) a lady of age entered into articles (1853) voidable by her under the Statute of Frauds. The articles agreed to settle a policy which when married was unassignable by her. While married she assigned the unassignable policy to X. (1854), became a *feme sole* February, 1885, charged it to Y. September, 1885, and died 1892. It fell into possession 1891. X. had a good title against Y. Under (5)? This obvious point, which was not mentioned, was surely decisive. Under common law ratification in 1885? Possibly; but Stirling, J., refers mainly to election and forfeiture. Yet (1) no evidence was adduced that the lady knew that she had a title paramount which election forfeited (see p. 306 (22)–(25)). (2) How could she elect—*i.e.* dispose of the reversion—before the reversion fell in, as it did in *Codrington* v. *C.*? Or did Stirling, J., attribute to election the *nunc pro tunc* qualities of ratification? And, further, Jessel, M.R., held her quasi-contractual and elective power co-extensive, *supra* (7); and North, J., held that the "original incompetency to deal with it"—*i.e.* the reversion—"continued down to the time when the husband died:" *Harle* v. *Jarman* ([1895] 2 Ch. 419, 424). How, then, could she forfeit what she could not by legal or equitable contract dispose of? North, J., *ib.*, pp. 428, 429, seems to think that the wife's contract here was void, not voidable; if so, this case should be classed under *Codrington* v. *C.*

(11) *In re Hodson* ([1894] 2 Ch. 421) was similar to (10), but the articles were voidable on the score of infancy; and the reversion unassignable by deed, unless acknowledged under Malins' Act. Yet, when married, she confirmed the articles by unacknowledged deed. She survived her husband two months. Here the principle of (5) applied even more clearly than in (10), yet it was barely mentioned; and Chitty, J., relied solely on the fiction that the unacknowledged deed operated as an election out of Court; and that this election forfeited her independent title to reversions, which had not fallen in, and were therefore unassignable except under Malins' Act.

(12) (6), (10), and (11) might also be explained on the theory that they illustrate the equitable right of a married woman to enter into quasi-contracts with regard to her separate property. Such right ought logically to include quasi-confirmation and repudiation. See (7). But contract has nothing to do with election.

(13) In *Carter* v. *Silber* Romer tried to apply the new doctrine of election to the case of men just emerged from infancy and was reversed. Conversely Cozens-Hardy, J., in *Viditz* v. *O'Hagan* ([1899] 2 Ch. 569), tried to apply *Edwards* v. *Carter* to the case of marrie women subject to the old law, and was reversed, but on other grounds.

In none of these thirteen examples are we on sure ground except

Result of these cases.

in (5), which does not concern election, and in (7) which is academic. On these matters the better opinion seems to be that election on the one hand, and common law, ratification, and repudiation on the other hand, still move in distinct spheres, between which there is no contact; even although they have been applied by nearly every judge of first instance to the same set of circumstances in order to serve the same ends in cases falling under the new election. The analogy between them is false. Whether there is a *tertium quid*, see (12), which is neither common law ratification, nor equitable election, is a question as yet undecided.

Satisfaction and Ademption.

In re **TUSSAUD'S ESTATE**; **TUSSAUD** *v.* **TUSSAUD.**

(9 Ch. D. 363.)

Principle.

The doctrine of satisfaction is founded on the presumption against double portions, but this presumption may be rebutted whether in a deed or a will by parol evidence of intention.

Summary of facts.

In 1867 F. Tussaud, on the marriage of his daughter, Mrs. White, covenanted with her trustees that his executors should, within six months after his or (if she survived him) his wife's death, transfer to the trustees the sum of £2000 consols to be held on the trusts of the settlement, which were (1) for Mrs. White's appointees, and in default of appointment (2) for her for life for her separate use, then (3) for her husband for life, and after the death of the survivor (4) for the children, sons at twenty-one, daughters at twenty-one or marriage, and in default of children (5) for Mrs. White absolutely.

In 1871 F. Tussaud paid the trustees £1000, thereby satisfying his covenant to the extent of a moiety. In 1873 F. Tussaud died, having by his will and codicil, both dated in 1873, bequeathed £2800 to the trustees of his will in trust for (1) Mrs. White for life for her separate use without power of anticipation, and after her decease (2) for such of her children as should attain twenty-one in equal shares, and in default of children (3) for testator's sons. The C. A. decided, reversing Jessel, M.R., that the provision for Mrs. White under the will and codicil was not to be considered as a satisfaction for F. Tussaud's liability under the covenant in the settlement.

Definition of satisfaction.

The following definition of satisfaction given, or rather adopted, in the notes to *Ex p. Pye* (1811), *Talbot* v. *Shrewsbury* (1714), and *Chancey's Case* (1717) (W. & T., L. C. ii. 366), was approved in *Lord Chichester* v. *Coventry* (L. R. 2 H. L. 71, 95)*. "Satisfaction is the donation of a thing with the intention that it is to be taken either wholly or in part in extinguishment of some prior claim of the donee."

Cases of I. Double portions; II. Creditors.

It arises in two classes of cases—first, when a father or person filling the place of a parent makes a double provision for a child or person standing towards him in a filial relation (*ante*, pp. 12, 13); secondly, when a debtor confers by will or otherwise a pecuniary benefit on his creditor.

I. Court leans against double portions.

Cases belonging to the first class occur in two ways—(1) either the father first gives to his child by will a legacy, and then makes provision for it; or (2) the father agrees to make a provision for a child, and subsequently makes a gift to that child by will. In either case if the gift is of residue the equity is only available as between the portioners: *Meinertzhagen* v. *Walters* (7 Ch. 670).

Satisfaction distinguished from ademption.

The first is called ademption, and the second is called satisfaction in its stricter sense. The presumption against double portions is more easily rebutted in the case of satisfaction than of ademption. "In a case of ademption, where the will is first, that is a revocable instrument, and the testator has an absolute power of revoking or altering any gift thereby made. But where the obligation is earlier in date than the will, the testator when he makes his will is under a liability which he cannot revoke or avoid. He can only put an end to it by payment or by making a gift with the condition, expressed or implied, that the legatees shall take the gift made by the will in satisfaction of their claim under the previous obligation:" per Cotton, L.J., l.c. (p. 380).

A second distinction is more one of language than of substance. Ademption means that a gift intended by the testator is adeemed *pro tanto*. It was decided for the first time that the ademption is *pro tanto* in *Pym* v. *Lockyer* (5 M. & C. 29) (1840). Satisfaction takes effect through election; and if a man elects against the will he need only compensate the disappointed legatees and devisees (see last case). The result is the same.

Thirdly, there is only competition between liability, not between perfected gift, and devise or bequest in cases of satisfaction. But this distinction is also immaterial.

What is a portion?

Jessel, M.R., asked in the l.c. "what is a portion?" No one, he said, would imagine that a gift of a necklace by a father to his daughter could be a portion. There must be a sum of such an amount as that it would reasonably be presumed to be an advancement. A small thing is a gift: *Ravenscroft* v. *Jones* (4 D. J. & S. 224), *ante*, p. 12; an annual sum is maintenance: *Watson* v. *W.* (33 B. 574); *Hatfeild* v. *Minet* (8 Ch. D. 136), as opposed to advancement. Nor, said Jessel, M.R., will the Court add up small sums which a father has from time to time given his child: "nothing could be more productive of misery in families than if he were to hold that every member of a family must account strictly for every sum received from a parent:" *Taylor* v. *T.* (20 Eq. 155, 158). Money paid to start a child in a business or profession is, money for education is not, advancement or portion (*ib.*); nor is it restricted to money; but means "something given to establish a child in life" (*ib.*), where seven different examples are given. It may be realty, *Clerk* v. *Lucy* (8 Vin. Abr. 154), specially appointable funds, *Montague* v. *M.* (15 B. 565), *In re Ashton* ([1898] 1 Ch. 142), a commission in the army, *Norton* v. *N.* (3 P. W. 317, n.), *Hopwood* v. *H.* (7 H. L. C. 728), shares of business or residue, *Bengough* v. *Walker* (15 Ves. 507), *In re Vickers* (37 Ch. D. 525), payment of a gambling debt, *Boyd* v. *B.* (4 Eq. 305), a covenant, *Chave* v. *Farrant* (18 Ves. 8) or a perpetual annuity, *Dawson* v. *D.* (4 Eq. 504). Further, it has been decided that such a sum is a portion whether given absolutely or for life with a power of appointment, *Lord Chichester* v. *Coventry* (L. R. 2 H. L. 71), or settled on a portioner for life remainder to her children, *Lady Thynne* v. *Earl of Glengall* (2 H. L. C. 131), or with a life estate to the husband interposed: *Weall* v. *Rice* (2 Russ. & My. 251).

The l.c. held parol evidence admissible.

The first point decided in the l.c. was that certain evidence of declarations made by the testator rebutting the presumption that he intended to satisfy the covenant in the settlement by the bequest in favour of Mrs. White was admissible. Parol evidence was admissible to rebut a presumption, although not to raise a presumption, and there was no distinction for this purpose between the case of a deed and a will, and the Court approved of what is laid down in Taylor on Evidence. See too *Hall* v. *Hill* (1 Dr. & War. 94)*, *Campbell* v. *C.* (1 Eq. 383), where the draft of a will was produced. The Court explained the matter thus:—

"If you find no expression" in the will or settlement, "you are driven to a presumption of law which only arises in the absence of an expressed intention to give a double portion. That is entirely independent of the construction of the will. When you come to a presumption to imply an intention in the will, then the rule always is that you may admit parol evidence to rebut such presumption;" but the parol evidence which was thus admitted did not, in their opinion, aid the case of Mrs. White and her children.

Intention of the will decided the l.c.

The question accordingly turned upon the language of the instruments themselves. "What we have to consider is well expressed by Lord Colonsay in the case of *Lord Chichester* v. *Coventry* (L. R. 2 H. L. 98) in these words: 'But I can conceive no consideration more important upon a question of double portions than the consideration of whether the parties to be benefited by the one are the same as the parties to be benefited by the other, or whether the nature of the benefit conferred in the one case is the same as the nature of the benefit conferred in the other.' It must be remembered that slight differences between the two provisions will not be sufficient to prevent the presumption from arising," such as the transposition of two life estates, differences of time, *Bethell* v. *Abraham* (22 W. R. 745), one estate being with and the other without restraint on anticipation. Compare *Thynne* v. *Earl of Glengall* (2 H. L. C. 131); *Russell* v. *St. Aubyn* (2 Ch. D. 398). "Slight differences, however, in the words of Sir John Leach, in *Weall* v. *Rice* (2 Russ. & My. 263), are such 'as, in the opinion of the judge, leave the two provisions substantially of the same nature;' and he adds, 'every judge must decide that question for himself.'" Under the settlement Mrs. White, with the consent of the trustees, had an absolute power over the fund. She had no such power under the will. Under the settlement Mr. White took a life interest after his wife, and in certain events an absolute interest. Under the will he had no interest, and the fund, if no child of Mrs. White took a vested interest, went over to the testator's sons. These were held by the C. A. to be such substantial differences between the two provisions as to rebut the presumption against double portions.

Parties different.

Rule different in satisfaction,

The question which influenced the Court most was that here, as in *Hall* v. *Hill* (*supra*), the parties were different. The only cases cited in support of the argument that there might be parties to the settlement who were strangers to the will, were *McCarogher* v. *Whieldon* (3 Eq. 236) and *Mayd* v. *Field* (3 Ch. D. 587); also in *Bethell* v. *Abraham* (3 Ch. D. 590, n.) the husband of the daughter was mentioned in the will but not in the settlement; or, as Jessel, M.R., put it, there was "an amplification of the trust for the child." In the first two cases, only the parties who took under will and settlement were put to their election, and the settlement stood so far as the interest was concerned of the party who took under the settlement but not under the will. *Bennett* v. *Houldsworth* (6 Ch. D. 671), and *Campbell* v. *C.* (1 Eq. 383), were also in point, but not mentioned. Jessel, M.R., in deciding that there was satisfaction, was obviously influenced by these cases. The C. A. as obviously resolved not to extend them in cases of satisfaction.

and ademption cases.

In cases of ademption settlements giving benefits to a daughter, her widower and children have adeemed *pro tanto* bequests to a daughter and her children. *Durham* v. *Wharton* (3 Cl. & F. 146)†; *Kirk* v. *Eddowes* (3 Ha. 509); *In re Furness* ([1901] 2 Ch. 346); *Ferris* v. *Goodburn* (27 L. J. Ch. 574); *Trimmer* v. *Bayne* (7 V. 508). Contrast

Cooper v. *Macdonald* (16 Eq. 258), where a lump sum paid to the husband was gift and not advancement.

In *Stevenson* v. *Marson* (17 Eq. 78) a settled adeemed an unsettled portion.

A direction to pay debts rebuts satisfaction, but not ademption.

A direction in a will to pay debts may rebut the presumption of satisfaction, per Turner, L.J., in *Coventry* v. *Chichester* (2 D. J. & S. 345); *Paget* v. *Grenfell* (6 Eq. 7); but see *Bennett* v. *Houldsworth* (6 Ch. D. 678, 679), but not of ademption of portions, *Dawson* v. *D.* (4 Eq. 514)†, citing *Trimmer* v. *Bayne* (7 V. 508), etc. In *Montagu* v. *Earl of Sandwich* (32 Ch. D. 525), Lord Sandwich, after charging an annuity of £1000 a year in favour of his second son on realty by deed, made his will, devising all his real estate, "subject to the charges and incumbrances thereon," in strict settlement on his first and other sons successively. He gave his second son legacies, the income of which, when invested, exceeded £1000 a year. The C. A. disagreed in their view of this case, but in the result held that the presumption against a double portion prevailed, Bowen, L.J., lamenting this "sacrifice upon the altar of authority."

In loco parentis.

In *Campbell* v. *C.*, a grandfather; in *Powys* v. *Mansfield* (3 My. & Co. 359), an uncle; in *In re Ashton* ([1898] 1 Ch. 142), a mother; in *In re Lawes* (*infra*), a natural father, stood *in loco parentis* (see p. 12).

Ejusdem generis.

In no case has the presumption against double portions been rebutted by the gifts not being *ejusdem generis*, although that has had weight along with other facts: such as that the gift was uncertain in amount or contingent, *Davys* v. *Boucher* (3 Y. & C. 397); *Bellasis* v. *Uthwatt* (1 Atk. 426); or where there is other crucial evidence, *Jeacock* v. *Falkener* (Bro. 1 Ch. 294); or presumption, *Goodfellow* v. *Burchett* (2 Vern. 298). In *Grave* v. *Lord Salisbury* (Bro. 1 Ch. 425), testator was not proved to be *in loco parentis* (6 Ves. 547). *Freemantle* v. *Banks* (5 Ves. 85) and *Holmes* v. *H.* (Bro. 1 Ch. 294) are no longer law, since *Lady Thynne* v. *Earl Glengall* (*supra*) and *Bengough* v. *Walker* (*infra*).

Share in partnership and bond.

In *In re Lawes* (20 Ch. D. 81) Lawes executed a bond to secure the payment of £10,000 to his reputed son, and shortly before the money was due agreed to take him into partnership, and credited him with £19,000, part of the capital thereof. The C. A. held that the £19,000 satisfied the £10,000, and explained the decision of Sir W. Grant in *Bengough* v. *Walker* (15 Ves. 507) as follows:—"Where a testator gives to a child a beneficial lease or share of works, or any other thing, and says nothing about the value, he is not to be taken to be giving it in satisfaction of a pecuniary bequest, but where he does refer to the value the presumption of satisfaction may arise. And when he gives it as being of larger amount than the legacy, and the legatee takes it, he takes it at the estimated amount, and in that case it makes no difference whether the testator directs the thing to be sold and gives him the proceeds, or directs the thing to be taken as a specific amount. In either case he shows his intention to give a definite amount." And in *In re Vickers* (37 Ch. D. 525) North, J., denied that the legacy in *Bengough* v. *Walker* was valued by the testator.

So, too, gifts of stock will adeem a charge on land: *Leighton* v. *L.* (18 Eq. 458)†. It seems to follow from that case and *Durham* v. *Wharton* (3 Cl. & F. 146), that a portion will adeem or satisfy a portion of whatever nature it consists.

Gifts for a particular purpose.

A gift by will for the purpose of satisfying a particular purpose followed by a gift for the same purpose will be adeemed, although the giver was not *in loco parentis*, and even when the particular purpose is to satisfy a moral obligation: *In re Pollock* (28 Ch. D. 552); *Monck* v. *M.* (1 Ball. & B. 303); *Pankhurst* v. *Howell* (6 Ch. 136). Here, too, the purpose and not the nature of the gift is considered.

The next case was decided on the ground of the alleged portion not being a portion, but it clearly belongs to the second class of cases.

In *In re Lacon* ([1891] 2 Ch. 482) Sir E. Lacon, by his will made in the year 1884, gave his shares in a partnership business to his three sons equally as tenants in common. At that time his eldest son Edmund was employed in the business as a manager. The other two sons were not employed in the business. Subsequently Edmund was admitted a partner, the testator making over to him two of his shares, and Edmund relinquished his salary as manager. There was no ademption.

II. Creditors' cases. Debt, when satisfied by legacy.

We pass now to the second kind of satisfaction. If a debtor bequeaths to his creditor a legacy equal to, or exceeding the amount of, his debt, it is presumed, on the principle *debitor non præsumitur donare*, that the legacy is meant by testator as a satisfaction of the debt. This presumption, though it has prevailed two centuries, has met with the censure of several judges; and the Courts lay hold of any minute circumstances to rebut it. Thus this presumption is not made where the debt is contracted after the making of the will, where it is a bill of exchange or negotiable security, or where the legacy is for some other expressed reason, *Wallace* v. *Pomfret* (11 V. 542), or contingent uncertain or not payable immediately, or of residue or of a different nature from the debt, *e.g.* the debt being due to the separate use of a married woman and the legacy payable to her absolutely (see *Fairer* v. *Park* (3 Ch. D. 309), or of a specific chattel. And, further, a bequest to a creditor, or, if he predeceases testator, to his issue, may satisfy the debt if the creditor survives, but cannot otherwise: *Rose* v. *Rogers* (39 L. J. Ch. 791). See Williams on Executors, 9th ed. 1162.

In *In re Fletcher* (38 Ch. D. 373) a testator bequeathed his wife a legacy of £625. He was at that time indebted to her to that exact amount. The debt was discharged in his lifetime, and it was held that the legacy being meant as satisfaction was adeemed.

Differences of time.

In re Fletcher is scarcely consistent with *In re Horlock* ([1895] 1 Ch. 516)†, where Stirling, J., said of the presumption, "No sooner was it invented than learned judges of great eminence expressed their disapproval of it, and invented ways to get out of it." If, therefore, a creditor who would be payable immediately on the testator's death is left a legacy payable one month after testator's death, that is not satisfaction: *Clark* v. *Sewell* (3 Atk. 96). "According to the rule of this Court, a legacy that ought to be deemed a satisfaction must take place immediately after the death of the testator." What, then, if no date is mentioned? In that case legacies need not be paid until a year after testator's death. Should a legacy where no time is mentioned satisfy a debt? *In re Dowse* (50 L. J. (Ch.) 285) and *In re Horlock* have answered that question in the negative. It looks as though the exceptions had whittled the rule away. But it survives where there is identity or an acceleration of payment. Thus in *Atkinson* v. *Littlewood* (18 Eq. 595), where testator covenanted to pay his wife, and bequeathed to his wife the same annual sum payable on the same quarter days, the gift was not duplicated; and similarly in *Wathen* v. *Smith* (4 Madd. 325), a debt which fell due six months after death was cancelled by a bequest payable three months after death. But *Wathen* v. *Smith* was disapproved of and not followed in *Cole* v. *Willard* (25 B. 568).

Direction to pay debts and contemporaneous deed.

The following is an exception to the rule in *Atkinson* v. *Littlewood.* In *Horlock* v. *Wiggins* (39 Ch. D. 142) a separation deed contained a covenant by the husband that his executors should on his decease pay to his wife £100; but that if £6 per month was paid her for six months from his death, the balance should only be paid at the end of that period. The husband by will of the same date directed his debts to be paid, and bequeathed to his wife "£100, payable within six months after my decease, £6 to be paid to her or her order until my estate is finally settled, the same to be deducted from the said £100 as per indenture stated in our mutual separation." The Court, emphasizing the fact that the testator directed his debts to be paid, and that this one debt must be fresh in his mind, decided that there was no satisfaction. Compare *Coates* v. *C.* ([1898] 1 Ir. R. 258).

A direction by a testator to pay debts is sufficient, without the further direction to pay legacies, to exclude the presumption that a legacy to a creditor equal to or exceeding the debt is a satisfaction of the debt: *In re Huish* (43 Ch. D. 260).

Crichton v. *Crichton.*

In *Crichton* v. *C.* ([1896] 1 Ch. 870) it was held (1) that a debt due for breach of trust was not satisfied by a portion because the donor and donee of the portion did not at the time regard the transaction in that light: *Plunkett* v. *Lewis* (3 Ha. 316) was distinguished; (2) per North, J., that where a debt is due it is not satisfied even *pro tanto* by a payment or gift of less or of uncertain amount; (3) that although the relationship of father and son existed in the case, and the debt was incurred in respect of a portion, since the debt from father to son was incurred by him *quâ trustee* to *c.q.t.*, and he had not supplied the portion, the rule which prevails as between creditor and debtor prevailed here. Consequently there was no satisfaction.

Cases of construction: *expressio unius.*

A bequest to C. and to D., with a proviso that a debt to C. must be taken in part satisfaction, will not necessarily preclude satisfaction in D.'s case: *Hopwood* v. *H.*; *Wallace* v. *Pomfret*, *supra.*

A testator "adeemed" a bequest of shares of residue by an advance of £4000. The amount adeemed was held to be £4000, minus the estate duty thereon: *In re Beddington* ([1900] 1 Ch. 771).

Duty deducted.

T. lends C. £10,000, or for value settles £10,000 on C. for life, with remainder in the events which happened to T. absolutely. Then T. leaves C. half his residue, and declares that the £10,000 shall be in part satisfaction thereof. Held by the C. A. that T. by these claims gives his interest in the £10,000 to C. by implication. Held by the House of Lords that C. should only have brought into hotchpot his life interest, and that the reserved interest was not subject to the hotchpot clause. But the result was the same in £ *s. d.*: *In re De Cosier* ([1897] 1 Ch. 325); S. C. *nom. Wheeler* v. *Humphreys* ([1898] A. C. 506).

Hotchpot clause.

An Englishman in a Scotch settlement settled £4000 on a daughter, her husband and children, and then after her death by (English) will left her children £21,000. There is no presumption in Scotland against double portions [*Johnstone* v. *Haviland* ([1896] A. C. 95)]. The will being English satisfied the settlement: *Campbell* v. *C.* (1 Eq. 383).

Conflict of laws.

Administration Judgments and Orders.

In re BLAKE, JONES *v.* BLAKE.

(29 Ch. D. 913.)

The former practice of the Court, that a person interested in the residue was entitled as of course to a full administration of the estate, is now completely altered, and all applications for administration judgments or orders are at the risk of the applicants.

Principle.

A testatrix left the residue of her real and personal estate to trustees upon trust to sell with all convenient speed, with power to postpone the sale at their discretion and hold the proceeds in trust for her issue equally. The trustees advertised the residuary estate for sale by auction, and an application was made on behalf of two residuary legatees, one of whom was an infant, asking (*inter alia*) that the trustees might be restrained from

Summary of facts.

selling the real estates out of Court, for certain accounts, and if and so far as should be necessary, general administration. The C. A. refused to interfere with the trustees' discretion as to selling the estate, directed certain inquiries, and declined to make any general order for administration.

New procedure.

The changes wrought in the practice as to administrations are contained in R. S. C., 1883, O. LV., rr. 3 to 5, under which application may be made for the determination of questions relating to express trusts and the administration of the estates of deceased persons, by means of an originating summons, without an administration of the estate or trust.

Further, O. LV., r. 10, provides that "it shall not be obligatory on the Court or a judge to pronounce or make a judgment or order, whether on summons or otherwise, for the administration of any trust, or of the estate of any deceased person, if the questions between the parties can be properly determined without such judgment or order." "Otherwise" refers to an administration action commenced by writ: *Campbell* v. *Gillespie* ([1900] 1 Ch. 225). To which r. 10A adds that the Court or a judge may order an application to stand over while trustees, executors, or administrators render to the applicant the accounts asked for, which they must do under penalty of paying costs: see *In re Dartnall* ([1895] 1 Ch. 474), *In re Bosworth* (58 L. J. (Ch.) 432); or may order administration when necessary to prevent proceedings by other creditors or beneficiaries with a proviso that no further proceedings are to be taken without leave.

O. LXV., r. 1, provides that the costs of proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge. The proviso saving mortgagees' and trustees' costs is discussed, *ante*, pp. 207, 211, 229.

Effect on costs, etc.

The combined effect of these rules has been to revolutionize the practice which concerns the administration of trusts and deceased persons' estates. "Formerly, if any one interested in a residuary estate instituted a suit to administer the estate, he had a right to require, and as a matter of course obtained, the full decree for the administration of the estate; and the Court, even if it thought that, although there were really questions which required decision, those questions might be decided upon some only of the accounts and inquiries which formed part of the decree, found itself fettered and unable to restrict the accounts and inquiries to such only as were necessary in order to work out the questions." It was thus that Cotton, L.J. (l.c. p. 916), described what Gridley described in other language in Bleak House, ch. xv., and there was a minor effect to some extent anticipated by *Croggan* v. *Allen* (22 Ch. 101), and *Bartlett* v. *Wood* (9 W. R. 817). "If a party comes and insists that there is a question to be determined, and, for the purposes of determining that question, asks for an administration judgment, the Court cannot refuse the judgment, unless it sees that there is no question which requires its decision; but if it turns out that what has been represented as the substantial question requiring adjudication is one which was not a substantial question, or that the applicant was entirely wrong in his contention as to that particular question, the Court can, and ordinarily ought to, make the person who gets the judgment pay the costs of all the proceedings consequent upon his unnecessary or possibly vexatious application to the Court." And this rule applies to executors and trustees as well as to beneficiaries: *In re Cabburn* (46 L. T. 848).

Infants.

It was laid down in the l.c. that the fact that one of the litigants is an infant is not sufficient reason for ordering administration.

Administration refused.

In *In re Stocken* (38 Ch. D. 319) an express direction by a testator that his trustees should bring an action for administration, did not deprive the Court of its discretion to refuse to order administration, though it was intimated that weight ought to be given to such a direction.

A partnership creditor "may obtain relief against the estate of the deceased partner without having exhausted his remedy against the survivor:" *In re Hodgson* (31 Ch. D. 177, 185); but his claim is postponed to those of separate creditors (*ib.*), and is limited to liabilities incurred during the joint lives: *Friend* v. *Young* ([1897] 2 Ch. 421); or if he asks for administration the surviving partner must be joined as defendant: *In re McRae* (25 Ch. D. 16); and therefore he cannot (probably) proceed by originating summons: *In re Barnard* (32 Ch. D. 447). O. LV., r. 10, qualifies O. XV., r. 1, which relates to administration actions commenced by writ: *In re Gyhon* (29 Ch. D. 834). Where a writ for administration has been issued, the Court will refuse to decide questions belonging to the action on a summons: *Borthwick* v. *Ransford* (28 Ch. D. 79). For the converse case see *May* v. *Roberts* (28 Sol. J. 152).

Administration granted.

Administration has been granted where a series of questions arose: *In re Wilson* (28 Ch. D. 457); *In re Dickinson* ([1884] W. N. 199). In *In re Wilson* (p. 461), Pearson, J., laid down the following rule:—"If there be a simple question as to whether or not a legacy has failed, . . . or any *isolated question* of that kind, the decision of which would at once set at rest all differences between all the parties taking under the will," administration is refused.

Originating summons for directions refused.

"A summons for inquiries or directions without administration is exactly equivalent to the old practice of commencing an administration suit, raising the particular point by the pleadings getting an inquiry or direction upon that point, and then staying further proceedings in the suit:" per Fry, L.J., *In re Medland* (41 Ch. D. 476, 492); so that there is jurisdiction to determine such questions only as before the existence of that rule could have been determined under a judgment for the administration of an estate or execution of a trust; for instance, a dispute between legal beneficial devisees under a will will not be decided: *In re William Davies* (38 Ch. D. 210); approved by C. A.; in *In re Royle* (43 Ch. D. 18). In that case defendant claimed adversely to the will; consequently there was no jurisdiction (compare *In re Gladstone* ([1888] W. N. 185) as to deeds); but she waived this objection, and the question raised by plaintiff was decided.

Questions arising on an intestacy between two claimants to real property: *Hope* v. *H.* ([1892] 2 Ch. 336); the setting aside of a release: *In re Ellis* (59 L. T. 924), but see *In re Garnett* (50 L. T. 172); the refunding of assets already distributed: *In re Warren* ([1884] W. N. 112),—are questions which will not be decided under Order LV., r. 3.

Questions involving breach of trust or wilful default, cannot be raised except, probably, by consent: *In re Neil* (62 L. T. 649): *In re Hengler* ([1893] W. N. 37). In an administration action commenced by writ, they should be pleaded: *In re Symons* (21 Ch. D. 757); *Edmonds* v. *Robinson* (29 Ch. D. 170, 175); *Dowse* v. *Gorton* ([1891] A. C. 190, 202), or, where there are no pleadings, alleged on the affidavits: *Barber* v. *Mackrell* (12 Ch. D. 534); but the practice on this matter "has been relaxed to some extent:" *In re Barclay* ([1899] 1 Ch. 681), citing *Smith* v. *Armitage* (24 Ch. D. 727). Accounts on the footing of wilful default are discussed in *In re Barclay*, and in *In re Stevens* ([1897] 1 Ch. 432–34; [1898] 1 Ch. 162).

Originating summons for directions granted.

A disputed debt, *In re Powers* (30 Ch. D. 291), or claim, whether to real or to personal property: *In re Lashmar* ([1891] 1 Ch. 258), *In re Hargreaves* (43 Ch. D. 401), *In re Croom* ([1891] 1 Ch. 695); a breach of covenant: *In re Parkin* ([1892] 3 Ch. 510); the priority of creditors: *In re Jones* (38 W. R. 90); equity to a settlement: *In re Briant* (39 Ch. D. 471); right to possession by equitable tenant for life: *In re Newen* ([1894] 2 Ch. 297); repairs and investments by trustees: *Conway* v. *Fenton* (40 Ch. D. 512), *In re Medland* (41 Ch. D. 476),—have been so decided where the facts were not in dispute, as in *In re Giles* (43 Ch. D. 391) (priority of mortgages). New trustees can be similarly appointed, and vesting orders made under O. LV., r. 13A.

Title of action.

The writ under O. XV., r. 1, or originating summons, under O. LV., r. 4, and the pleadings in administration actions ought to be entitled "In the matter of the estate of A. B., deceased. Between C. D., plaintiffs, and E. F., defendants."

Parties.

An originating summons under O. LV., r. 3, can be taken out by (1) any executor, administrator, or trustee, or by any (2) creditor, beneficiary, next of kin or heir, or his or their assigns. If taken out by (2), the executors, administrators, or trustees alone are served in the first instance; if by (1), see O. LV., r. 5.

When an action or summons is for the administration of personal estate only, a creditor may sue on behalf of himself; but where it is for the administration of real and personal estate, and there is no devise of real estate to trustees with power to sell, a plaintiff must sue "on behalf of himself and all other the creditors" accordingly: *In re Vincent* (26 W. R. 94); *In re Royle* (5 Ch. D. 540).

In an action for account against trustees alleging breaches of trust, the representatives of deceased trustees need not be made parties, but may be added under O. xvi., rr. 11, 48: *In re Harrison* ([1891] 2 Ch. 349). But see *In re Gilson* ([1894] 2 Ch. 92); *Wynne* v. *Tempest* ([1897] 1 Ch. 110), *ante*, p. 193.

Absent parties.

The practice of the Court with regard to binding absent parties in cases where under O. xvi., r. 32 *et seq.*, a judgment or order for administration or execution of trusts is obtained without serving some of the parties interested, was stated thus in *May* v. *Newton* (34 Ch. D. 347): "Persons interested in the property which is being administered and whose rights or interests may be affected by an order directing accounts or inquiries are not bound—at any rate when they ought to be served with notice of such order—unless they are so served or unless a representation order is made. If service upon them is dispensed with, or if under O. xvi., r. 46, the Court proceeds in the absence of any one representing them, they are not bound." See *In re Davies* (64 L. T. 824), *In re Foster* (45 Ch. D. 630), *In re Hake* ([1895] W. N. 116).

Conflict of law.

It is the business of the English executor of a foreigner to collect the English assets and pay the English debts and other debts of which he has notice, according to English law. If foreigners prove debts against deceased, they are under English law entitled to dividends *pari passu* with English creditors in the administration of English assets: *In re Klœbe* (28 Ch. D. 175)*. The debts should be proved in England: *In re Boyse* (15 Ch. D. 591); but if a debt in respect of foreign realty is concerned action should be brought in the *forum rei sitæ*, and the Court will acknowledge a claim so established: *Batthyany* v. *Walford* (33 Ch. D. 624; 36 Ch. D. 269). Net assets after payment of such debts are handed over to the principal executor. See pp. 3, 4.

The principles upon which foreign judgments are recognized in English Courts are discussed in *Roussillon* v. *R.* (14 Ch. D. 351, 370 *et seq.*) (1) †; *In re Trufort* (36 Ch. D. 600) (2) †; *Nouvion* v. *Freeman* (15 A. C. 1) (3); *Huntington* v. *Attrill* ([1893] A. C. 150) (4); *Sirdar G. Singh* v. *Farikdote* ([1894] A. C. 670) (5); *Pemberton* v. *Hughes* ([1899] 1 Ch. 781) (6); and may be thus stated: A judgment by a foreign Court on a matter within its apparent jurisdiction (6) for a fixed non-penal (4) sum, if final (3), and *bonâ fide*, and not against our policy (1), though irregular (6), undefended (6), and based on mistake, *e.g.*, as to English law (2), induces our Courts to consider the defendant bound (1) where he is a subject of the foreign country in which judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4)

where he has voluntarily appeared; (5) where he has contracted to submit himself to the *forum* in which the judgment was obtained; (6) and possibly where the defendant has real estate within the foreign jurisdiction in respect of which the cause of action arose whilst he was within that jurisdiction (1). Thus *ex parte* judgments against non-residents are ignored (1) (5). See *ante*, p. 1 *et seq.*

Judge in Chambers.

Summonses under O. LV., r. 3, for obtaining judgment on the construction of a document or on a point of law, orders for general administration or for execution of a trust, or for accounts and inquiries relating to trust property or a deceased person's property, or for the appointment of provisional liquidators and new trustees, or for substituted service or service out of the jurisdiction, or for vesting orders, come before the judge in person (O. LV., rr. 15, 15A).

By O. LV., r. 2 (16), orders made on further consideration for the distribution of an insolvent estate or of the estate of an intestate, or for the distribution of a fund among creditors or debenture holders, are to be made in Chambers; but a plaintiff will not be disallowed his costs where the distribution of the estate gives rise to questions of difficulty: *In re Barber* (31 Ch. D. 665).

Appeals and other practice.

An originating summons is defined by R. S. C., 1883, O. LXXI., r. 1A, as "every summons other than a summons in a pending cause or matter." In order to be "an action" an originating summons must be (1) under the R. S. C.; (2) not *ex parte*; (3) not interlocutory. Applications under the *Charitable Trusts Act*, 1853, the *Trustee Act*, 1893, and *Land Transfer Act*, 1897, can now be made under the R. S. C., O. LV., rr. 4A, 13, 13A; and will therefore, like summonses for directions, administrations, foreclosure, etc., be appealable within three months: *In re Fawsitt* (30 Ch. D. 231; O. LVIII., r. 15). Though an action for appeal purposes, an originating summons cannot like a writ be served out of the jurisdiction: *In re Busfield* (32 Ch. D. 123; O. XI.); *In re Compagnie Générale D'Eaux* ([1891] 3 Ch. 456); *In re Cliff* ([1895] 2 Ch. 21); nor does it admit third-party procedure: *In re Wilson* (45 Ch. D. 266; O. XVI., r. 48). Summonses under the *Trades Marks Acts, S. L. Acts, M. W. P. Acts, Vendor and Purchaser Acts*, and under O. LIV., r. 4F, are not actions, and are appealable within fourteen days (O. LVIII., r. 7). Claims on summonses in administration actions are interlocutory for purposes of appeal, final in that fresh evidence cannot be given: *In re Compton* (27 Ch. D. 392). If an order is made in Court the date to appeal is calculated from the refusal or perfecting of the order; if made in Chambers, from the refusal or pronouncing or receipt of notice of the order. Leave may be given to extend the time. Appeal lies from a judge in Chambers if he within fourteen days gives leave to appeal on motion made in Court: *In re Giles* (43 Ch. D. 391); *Boxke* v. *Stevenson* ([1895] 1 Ch. 358), or certifies that he requires no further argument—in each case counsel should have argued the case: *In re Somerville* (56 L. T. 424)—or by leave of the C. A.: *In re Giles, Strong* v. *Carlyle Press* ([1893] 1 Ch. 268).

Costs.

The plaintiff in a legatee's administration action is entitled to his costs between solicitor and client, where the estate is insufficient for the payment of legacies in full, but otherwise solvent: *In re Harvey* (26 Ch. D. 179); *In re Wilkins* (27 Ch. D. 703). In a creditor's administration action plaintiff or the person having conduct of the action will be similarly entitled although the estate is insolvent: *Richardson* v. *R.* (14 Ch. D. 611); *In re Pearce* (56 L. T. 228). In *In re New Zealand M. R. Co.* ([1901] 2 Ch. 357)† the same rule was extended to a winding-up case conducted by a debenture-holder.

In *In re Vowles* (32 Ch. D. 243) a sole executor who became bankrupt after judgment was a debtor to the estate, and it was held, following *In re Basham* (23 Ch. D. 195), that he must be allowed his costs subsequent to the bankruptcy, but his prior costs must be set off against his debt to the estate. In *In re Griffiths* (26 Ch. D. 465) the action was against the executor of a defaulting executor whose estate was insolvent, and it was held that as he was before the Court in a double capacity he was entitled to the costs of taking the accounts of the original testator's estate and half the rest of the costs of the action out of the same estate. And see *McEwan* v. *Crombie* (25 Ch. D. 175) for bankrupt trustees.

In an administration as in a partition action (*supra*, p. 147) only one set of costs is allowed; therefore legatees and their mortgagees must not appear separately: *Greedy* v. *Lavender* (11 B. 417); *Remnant* v. *Hood* (27 B. 82, 613). After orders relating to costs were made, supplemental orders relating to those costs were made in *In re Scowby* ([1897] 1 Ch. 741), following *Brown* v. *Burdett* (37 Ch. D. 207; 40 Ch. D. 244). As to trustees' costs, see *ante*, pp. 211, 212; where real and personal estate is administered, see *ante*, p. 283.

The Vendor and Purchaser Act, 1874 (37 *&* 38 *Vict. c.* 78).

In re HARGREAVES and THOMPSON'S CONTRACT.

(32 Ch. D. 454.)

Principle.

The Court has jurisdiction on a summons under the Vendor and Purchaser Act, 1874, *not only to decide all questions arising out of the contract (except such as affect the existence or validity thereof), but also to make any order that would be just as the natural consequence of its decision.*

Summary of facts.

On a summons under this section the Court was of opinion that the minerals under a part of the property agreed to be sold belonged to the lord of the manor, and made a declaration that the vendors had not shown a good title, and ordered the deposit to be returned. A further question arose whether the Court had jurisdiction on the summons to order the return of the deposit with interest thereon at 4 per cent., and the purchaser's costs of investigation of the title, and the C. A. decided both these points in the purchaser's favour.

Vendor and Purchaser Act, 1874. s. 9.

The process of buying land has always resembled a suit in equity, and the parallel is rendered more complete by the V. and P. Act 1874, s. 9, which provides that "a vendor or purchaser of real or leasehold estate in England, or their representatives respectively, may, at any time or times, and from time to time, apply in a summary way, to a judge of the Court of Chancery in Chambers in respect of any requisitions or objections or any claim for compensation or any other question arising out of or connected with the contract (*not being a question affecting the existence or validity of the contract*), and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid." "The object of the Legislature," said Bacon, V.C., in *Thompson* v. *Ringer* (44 L. T. 507), "in passing the Act, was to diminish frivolous suits, and afford a more cheap and speedy tribunal for determining questions between vendor and purchaser." Hence he dismissed an action for specific performance which travelled over the same ground as a previous V. and P. summons.

The decision in *In re Burroughs* (5 Ch. D. 601), that the parties are in the same position as if a reference had been made as to title in a judgment for specific performance, that they were therefore at liberty to produce evidence by affidavit with the cross-examination thereon, must be studied along with the following passage from the l.c. :—"Although the Court is not in the position in which it would be if it had the litigants before it in action properly brought according to the established practice of the Court, still there is authority given us not only to decide the questions asked, but to make an order which would be just, as the natural consequence of what we have decided. The object of the Legislature was to enable either vendor or purchaser to obtain the decision of the Court upon some *isolated point* (see *ante*, p. 325), instead of being compelled to have recourse to the whole machinery which would be put in motion by an action or suit for specific performance."

Object of the Legislature.

In *In re Ebsworth and Tidy's Contract* (42 Ch. D. 23), *In re Bryant and Barningham's C.* (44 Ch. D. 218), compare *Pearl Life Ass. Co.* v. *Buttenshaw* ([1893] W. N. 123), an order was made similar to that in the l.c. In *In re Higgins and Percival* (59 L. T. 213) and *In re Walker and Oakshott's C.* ([1901] 2 Ch. 383) a declaration was added that the contract was rescinded. In *In re Yeilding and Westbrook* (31 Ch. D. 344) and *In re New Land, etc., Association and Gray* ([1892] 2 Ch. 138) costs were charged on the estate. In *In re Fawcett and Holmes* (42 Ch. D. 150) compensation was ordered.

Practice.

The practice is to take out a summons, which is to be intituled in the matter of the contract and in the matter of the *Vendor and Purchaser Act*, 1874 (Ann. Pr., 1902, p. 1070), and it is not unusual for the parties to agree upon a short written statement of facts, which is signed by the solicitor for the parties, and a copy of which is left at Chambers either before or after the return of the summons: Daniell's Chancery Practice, 6th ed. p. 1382; and see Daniell's Chancery Forms, 5th ed., by C. Burney, f. 2289. The summons may be heard in Chambers, or, as is the more usual practice, adjourned into Court. In *In re Coleman and Jarrom* (4 Ch. D. 165) Jessel, M.R., delivered judgment in open Court, though the question had been argued in Chambers.

The time for appealing is fourteen days from the date of simple refusal, or from the date of perfecting the order, or (if in Chambers) from the date of refusal or when the order was pronounced or when the appellant first had notice thereof: O. LVIII., rr. 9, 15; *In re*

Helsby ([1894] 1 Q. B. 742); and see *In re Clay and Tetley* (16 Ch. D. 3).

Questions determined under the section.

Service out of the jurisdiction is not permissible: *ante*, p. 328.

The following are some questions determined under sect. 9:—

(1) Misleading conditions of sale are illustrated by non-disclosure of voluntary root of title: *In re Marsh and Earl Granville* (24 Ch. D. 11), or of onerous covenants in a lease, *In re Haedicke and Lipski's C.* ([1901] 2 Ch. 666); *In re Davies and Cavey* (40 Ch. D. 601); *In re White and Smith's C.* ([1896] 1 Ch. 637).

(2) Conditions that vendor may rescind. These apply only where he has some title: *In re Deighton and Harris' C.* ([1898] 1 Ch. 458); *In re Terry and White's C.* (32 Ch. D. 14); *In re Jackson and Woodburn's C.* (37 Ch. D. 44), and ceases after an adverse judgment on a summons: *In re Arbib and Class's C.* ([1891] 1 Ch. 601). If exercised during litigation vendor may have to pay costs thereof: *In re Spindler and Mear's C.* ([1901] 1 Ch. 908).

(3) Vendor's right to interest; after delay, but not default by him: *In re Young and Harston's C.* (31 Ch. D. 168); *In re Hetling and Merton's C.* ([1893] 3 Ch. 269); *In re London (Mayor) and Tubb's C.* ([1894] 2 Ch. 524); *In re Wilson and Stevens' C.* ([1894] 3 Ch. 550); *In re Strafford (Earl) and Maples* ([1896] 1 Ch. 235); *In re Woods and Lewis's C.* ([1898] 2 Ch. 211); *Bennett* v. *Stone* ([1901] W. N. 225).

(4) When powers of sale are exercisable by executors selling leaseholds, *In re Whistler* (35 Ch. D. 561); *In re Venn and Furze's C.* ([1894] 2 Ch. 101), or realty for debts: *In re Tanqueray-Willaume and Landau* (20 Ch. D. 465) (20 years' delay allowed), by trustees after a resettlement: *In re Wright's Trustees and Marshall* (28 Ch. D. 93); *In re Ducane and Nettlefold's C.* ([1898] 2 Ch. 96, 106); *In re Mundy and Roper's C.* ([1899] 1 Ch. 275); or not exercisable by administrator with will annexed: *In re Clay and Tetley* (16 Ch. D. 3), nor by assigns of trustee-mortgagee: *In re Rumney and Smith* ([1897] 2 Ch. 351).

(5) What consents are necessary: *Finnis to Forbes* (24 Ch. D. 587) (Charity Commissioners); *In re Earle and Webster's C.* (24 Ch. D. 144); *Tweedie* v. *Miles* (27 Ch. D. 315) (beneficiaries (*sui juris*)); *In re Bedingfield and Herring's C.* ([1893] 2 Ch. 332) (bankrupt and his trustee).

(6) What are the usual covenants in a lease, and as to whether the agreement for a lease specified a date for its commencement: *In re Lander and Bagley's C.* ([1892] 3 Ch. 41); *post*, p. 337.

(7) The appointment of a trustee under *C. Act*, 1881, s. 31 (*Trustee Act*, 1893, s. 10), in the place of a trustee who had been abroad for more than twelve months: *In re Coates to Parsons* (34 Ch. D. 370).

(8) Under the *Land Transfer Act*, 1897, all general executors must concur in conveying realty: *In re Pawley & London & P. Bank* ([1900] 1 Ch. 58); *In re Cohen's Exors. & London C. C.* ([1901] 1 Ch. 237).

(9) If V. contracts to sell to P., *quâ* trustee for sale, he may not sell *quâ* tenant for life: *In re Bryant and Barningham's C.* (44 Ch. D. 218).

(10) What documents must be abstracted in chief: *In re Ebsworth and Tidy's C.* (42 Ch. D. 23); *In re Stamford Banking Co. and Knight's C.* ([1900] 1 Ch. 287), costs of perfect abstract: *In re Johnson and Tustin* (30 Ch. D. 42), and of handing over essential deeds: *In re Duthy and Jerson's C.* ([1898] 1 Ch. 419), are borne by V.; costs of verifying the abstracted deeds by purchaser: *In re Stuart and Seadon's C.* ([1896] 2 Ch. 328).

(11) Recitals receivable instead of evidence: *In re Marsh and Earl Granville* (24 Ch. D. 11).

(12) Incidence of Succession Duty: *In re Cooper and Allen's C.* (4 Ch. D. 802; cited, 1898, A. C. 551); *In re Kidd and Gibson's C.* ([1893] 1 Ch. 695). See, too, Seton's lists, p. 1885.

Interest on deposit.

In the l.c. a question arose as to the time from which interest ought to be paid on the deposit. On this point the judgment of the C. A. was as follows:—"I think interest ought to be given from the day when the deposit was paid, on this ground, that at that time the vendors tried to sell what they had no title to. Therefore from the very time when this deposit was made the vendors were in the wrong. It is different from a case where, in consequence of delay or otherwise, the purchaser may have had a right to say the contract is at an end and he will not complete. Then it may be that the deposit would only be wrongfully held from the time when the purchaser, having a right so to do, had declared that he would be no longer bound by the bargain. But here from the very first the vendors were wrong in purporting to sell that which they had not, namely, the minerals as well as the surface." The rate of interest was 4 p.c. in *In re Marshall and Salt's C.* ([1900] 2 Ch. 206); *Jacobs* v. *Revell* ([1900] 2 Ch. 869): see *ante*, p. 158.

Validity of contract may not be impugned.

Controverted facts are unsuitable in procedure by summons: *In re Popple and Barratt* (25 W. R. 248): see *ante*, p. 326; and the expression, "vendor, etc.," implies that at least nominal consideration must pass: *In re Marquis of Salisbury* (23 W. R. 824). Further, questions affecting the existence of the contract are specially excepted from the jurisdiction on a summons under sect. 9. Accordingly, if the deposit is paid in pursuance of a contract which is binding in law, although equity will not order specific performance on the ground that some hardship is involved—as, for instance, that the purchaser after accepting the title discovers that it is bad—there is no jurisdiction to order a return of deposit on a vendor and purchaser summons; but liberty may be given to bring a separate action at law: *In re Davis and Cavey* (40 Ch. D. 601); *In re Scott and Alvarez's C.* ([1895] 2 Ch. 603); cited, *ante*, p. 68. Nor may questions of fraud, etc., be raised: *In re Sandbach and Edmondson's C.* ([1891] 1 Ch. 99). Repayment of money paid under mistake will not be ordered except where objections to the jurisdiction are waived: *In re Young and Harston's C.* (31

Ch. D. 168–171). Damages for vendor's delay are not recoverable under this section: *In re Wilson and Stevens's C.* ([1894] 3 Ch. 546). Rights of a third party to receive purchase-money cannot be decided under a summons under this section; but the summons may be amended and made into an originating summons under R. S. C., O. LV., r. 3: *In re Tippett and Newbould's C.* (37 Ch. D. 444). "Although a question may be raised as to the validity of the contract as it stands," *i.e.* a question which the Court will not discuss, "yet questions as to the construction of the contract ought to be determined:" per C. A. in *In re Hughes and Ashley's C.* ([1900] 2 Ch. 595, 600).

Declarations that title is good; or that title though good ought not to be forced on purchaser.

It has become usual on a V. and P. summons to insert declarations that the title is good as per contract; but this ought to be seldom done: *In re Wallis and Barnard's C.* ([1899] 2 Ch. 515). And the same remark applies to declarations that such title, though good, ought not to be forced on purchaser. This declaration was made *inter alia* in (1) *In re New Land, etc., Ass. and Gray* ([1892] 2 Ch. 138), distinguished in *In re Clayton and Barclay's C.* ([1895] 2 Ch. 212) (bankrupt acquires and sells realty); (2) *In re Briggs and Spicer* ([1891] 2 Ch. 127); (3) *In re Thackwray and Young's C.* (40 Ch. D. 34) (company sells superfluous land, reserving a lien); (4) *In re Maskell and Goldfinch's C.* ([1895] 2 Ch. 525) (infants sell gavelkind at undervalue); (5) *In re Hollis Hospital and Hague's C.* ([1899] 2 Ch. 540) (perpetuity applied to common law conditions); (6) *In re Marshall and Salt's C.* ([1900] 2 Ch. 202).

In (1), (5), and (6) the person chiefly interested was not before the Court, and threatened proceedings. In (4) there were infants. (2) is overruled ([1897] 1 Ch. 776).

Specific Performance and the Statute of Frauds.

ROSSITER *v.* MILLER.

(3 APP. CAS. 1124.)

MADDISON *v.* ALDERSON.

(8 APP. CAS. 467.)

Principle.

Contracts to sell land are specifically enforceable if in writing or partly performed. If such a contract must be collected from letters, the letters must specify the parties, property, price, and promise; and a promise is specified although the letters refer to a *future formal contract,* SECUS *if they suspend assent until execution thereof. A parol contract followed by a positive act (other than part payment or marriage) which is part of and exclusive referable to the contract is partly performed.*

Summary of facts.

In the first case Rossiter and others owned certain land, and authorized White to dispose of it. The land was laid out in lots, and a plan made, with conditions of sale printed on it. One of these conditions set out the price of each lot, and another required that a purchaser should, on completion, execute a deed of covenant embodying the conditions. Miller verbally offered to purchase some of the lots. White informed him that he must purchase subject to the conditions stated on the plan, and promised to lay his offer before "the proprietors." Then White wrote to Miller stating that "the proprietors" had accepted his offer subject to the conditions printed on the plan, that "it was taken into consideration by them in reducing the published price that you intended building at once," and that he had requested their solicitors to forward an agreement. Miller wrote back that he would not be bound to build at any given time, and therefore "the offer had better be reconsidered, unless you are prepared to leave me at liberty to do as I think best." White wrote that his former letter was "not intended to convey a conditional acceptance of your offer therein defined. . . . In your own words, you are at liberty to do as you may think best." Then the vendor's solicitor forwarded the formal agreement, which Miller returned unsigned and refused to complete. Held, by the House of Lords, that there was a complete contract in writing, which Miller was bound specifically to perform.

In the second case a housekeeper had served her deceased master gratuitously during his life on a verbal promise of a life interest in his realty if she survived. She was not entitled to specific performance of the promise.

The jurisprudence grafted by equity upon the *Statute of Frauds* (see Note) may be classed under two heads: the construction of its letter which orders contracts to sell land to be in writing: and the sacrifice of its letter to its spirit. The first head is dealt with in the first l.c., and the second head in the second l.c. The question asked in the first l.c. is, What is a complete contract in writing? in the second, What is part performance?

I.—A COMPLETE CONTRACT IN WRITING.

Principle of the l.c.

In the first l.c. the House of Lords, reversing the C. A., and restoring the decision of Jessel, M.R., proceeded on a principle of law which was stated by Lord Hatherley as follows:—"If you can find the true and important ingredients of an agreement in that which has taken place between two parties in the course of a correspondence, then, although the correspondence may not set forth, in a form which a solicitor would adopt if he were instructed to draw an agreement in writing, that which is the agreement between the parties, yet, if the parties to the agreement, the thing to be sold, the price to be paid, and all those matters, be clearly and distinctly stated, although only by letter, an acceptance clearly by letter will not the less constitute an agreement in the full sense between the parties, merely because that letter may say, 'We will have this agreement put in due form by a solicitor'" (p. 1143).

Lord Cairns cited with approval Lord Westbury's dictum in *Chinnock* v. *Ely* (*Marchioness of*) (4 D. J. & S. 638)*: "If there had been a final agreement, and the terms of it are evidenced in a manner to satisfy the *Statute of Frauds*, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared."

Lord Blackburn declared the law to be that, quite independently of sect. 4 of the *Statute of Frauds* (see Note), there must be a complete agreement, "if not there is no contract, so long as the parties are only in negotiation; even though they have agreed on all the cardinal points, either party may retract. But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared embodying the terms which shall be signed by the parties does not by itself show that they continue merely in negotiation;" a point of view characteristic, he said, of equitable lawyers. "It is a matter to be taken into account in construing the evidence, and determining whether the parties have really come to a final agreement or not" (p. 1151); a point of view on which, he said, non-equitable lawyers laid most stress in *Ridgway* v. *Wharton* (6 H. L. C. 238).

The parties, subject-matter and price must be mentioned so as to be capable of identification.

These extracts may be summarised thus: if the essentials of a contract, *i.e.* (1) persons, (2) property, (3) price, and (4) promise, are definitely described in writing, the statute is complied with. *Rossiter* v. *Miller* is a leading authority on the expression of the first and fourth essentials in letters. We will take these points in order. (1) The mention of "the proprietors" was sufficiently definite, because "*id certum est quod certum reddi potest.*" "If I enter into a contract to sell Blackacre on behalf of the owner, there is a statement of fact as to which there can be perfect certainty:" per Lord Cairns, p. 1141. Compare *Pearce* v. *Gardner* ([1897] 1 Q. B. 688), where V.'s (vendor) name was on the envelope only: *Filby* v. *Hounsell* ([1896] 2 Ch. 737), where V.'s agent signed *quâ* agent *ad hoc; John Griffiths Corp.* v. *Humber* ([1899] 2 Q. B. 414), where V.'s agent signed a document referring to the unsigned contract; *Sims* v. *Landray* ([1894] 2 Ch. 318), where the auctioneer's clerk was authorized to sign; *Catling* v. *King* (5 Ch. D. 660) ("trustee selling under a trust for sale"); *Commins* v. *Scott* (20 Eq. 11) ("company"); *Hood* v. *Barrington* (6 Eq. 218) ("executor of A. B."); *Carr* v. *Lynch* ([1900] 1 Ch. 613) (payer of £50 to me to-day). Contrast *Bell* v. *Balls* ([1897] 1 Ch. 663), where auctioneer's clerk signed; *Jarrett* v. *Hunter* (34 Ch. 182); *Potter* v. *Duffield* (18 Eq. 4) ("vendor"); *Coombs* v. *Wilkes* ([1891] 3 Ch. 77) ("landlord"); *Williams* v. *Jordan* (6 Ch. D. 517 ("Sir") Compare *Thomas* v. *Brown* (1 Q. B. D. 714). (2) Similarly if there is a contract to buy "my property," sold by auction on such and such a day, at such and such a place, *Shardlow* v. *Cotterell* (20 Ch. D. 90), "or 24 A. at T.," *Plant* v. *Bourne* ([1897] 2 Ch. 281); similarly, if a date for performance, though not mentioned, can be gathered from the terms of an executory agreement for a lease, *In re Lander and Bagley's C.* ([1892] 3 Ch. 41); *Marshall* v. *Berridge* (19 Ch. D. 233). (3) Similarly, if the price is to be settled by a valuer already appointed, *Smith* v. *Peters* (20 Eq. 511); *Richardson* v. *Smith* (5 Ch. 648), all these descriptions are sufficiently precise for the contract to be specifically enforced. (4) Parties often "enter into a negotiation, meaning that each party is to reserve to himself the right to retire from the contract if, on looking at the formal contract, he finds that though it may represent what he said, it does not represent what he meant to say:" per Lord Blackburn, p. 1152. This is the effect when the parties agree that the agreement shall not be binding until the formal contract is drawn, *Chinnock* v. *Ely*, *supra*, *Hucklesby* v. *Hook* ([1900] W. N. 45), or the acceptance, *Winn* v. *Bull* (7 Ch. D. 29); *Hudson* v. *Buck* (7 Ch. D. 683); *Honeyman* v. *Marryatt* (6 H. L. C. 112), or offer, *Lloyd* v. *Nowell* ([1895] 2 Ch. 744), is made "subject to the preparation and approval" or "completion" "of a formal contract." Not that there is any magic in

The letters must not be meant as mere negotiations, but as promises;

the word "subject." In *Hussey* v. *Horne-Payne* (4 A. C. 311)* the acceptance had been "subject to the title being approved by our solicitor;" but that meant no more than the liberty which every purchaser impliedly reserves to himself of breaking off the contract if the vendor breaks the contract by not making a good title. The C. A. had construed these words as a condition; but Lord Cairns, L.C., pointed out that they would, if so construed, imply that the vendor was free, but the purchaser bound, and this was a palpable absurdity; and he preferred to construe them as a truism instead. This decision was followed in *Filby* v. *Hounsell* ([1896] 2 Ch. 737); *North* v. *Percival* ([1898] 2 Ch. 128). If the sale is subject to V.'s performing some condition, V. must do his best to perform it: *Hudson* v. *Buck, supra*; *Day* v. *Singleton* ([1899] 2 Ch. 320). Again, "the mere reference to a future contract is not enough to negative the existence of a present one:" per Fry, J., *Bonnewell* v. *Jenkins* (8 Ch. D. 70) (where the word "subject" was also used); *Skinner* v. *M'Douall* (2 D. & S. 265); *Gray* v. *Smith* (43 Ch. D. 208); and the l.c. Again, the offer may be alternative, and the acceptance single: *Lever* v. *Koffler* ([1901] 1 Ch. 543). Again, agreements to buy and sell are often mere sketches or outlines; and the question arises, "Was this an acceptance only of a cardinal point," or of a complete offer, "describing it by reference to its most material term," *e.g.* its price? *Bonnewell* v. *Jenkins* (*ubi supra*). This point was raised in the l.c. by the fact that a new condition was apparently introduced in the first and refused in the second letter. It had already been decided that if the acceptance is accompanied by a counter offer of new terms that means at best that the parties have as yet only agreed to the most material terms of an agreement: *Crossley* v. *Maycock* (18 Eq. 180); *Nesham* v. *Selby* (7 Ch. 406); *Jones* v. *Daniel* ([1894] 2 Ch. 332). These cases differ from the l.c. in two ways: if a new condition was put in to the first letter, it was a condition for the exclusive benefit of the vendor, and the vendor waived it in his third letter. *Hawksley* v. *Outram* ([1892] 3 Ch. 359), where a new condition in restraint of trade was introduced by the agent and repudiated by the principal, was decided on this ground. But, after all, it was not a new condition; because where there is a contract by letters, technical words must not be pressed, and all the letters must be read together, and the first letter, looked at in the light of the third letter, expressed only a suggestion, not a condition.

i.e. promises to accept the contract, and not merely terms of it.

Principles on which letters are construed.

These two cardinal principles for construing a contract by letters—to read them as a whole, and to adopt popular loose canons of construing the expressions used, are illustrated by the following cases:—

In *Hussey* v. *Horne-Payne, supra*, there was, after all, an Achilles' heel in the contract. V. offered to sell land for such and such a price; P. accepted, subject to the condition referred to. If the matter had ended here, the contract was complete: per Lord Cairns, L.C., p. 317. But the offer and acceptance were contained in letters; and P. went on in subsequent letters to demand payment by instalments, V.'s solicitor payment by deposit, and the balance on completion.

It looked up to this point (as Malins, V.C., held) as though P. were trying to repudiate the agreement or add a term to it. But it was not so; for V. afterwards wrote direct to P. that she had instructed her solicitor to allow payment by instalments. It was held that this last letter threw a back-light upon the previous letters, and precluded the supposition that the parties were *ad idem* after the first two letters.

Lord Selborne, in delivering judgment, adhered to his observations in *Jervis* v. *Berridge* (8 Ch. 351, 360), that the *Statute of Frauds* is "a weapon of defence, not offence," and "does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties," which must be gathered from the entire series of letters. And Lord Cairns, L.C., stated the law thus: "It is one of the first principles applicable to a case of the kind, that where you have to find your contract, or your note or memorandum of the terms of the contract in letters, you must take into consideration the whole of the correspondence which has passed. You must not at one particular time draw a line and say, 'We will look at the letters up to this point and find in them a contract or not, but we will look at nothing beyond.' In order fairly to estimate what was arranged and agreed, if anything was agreed between the parties, you must look at the whole of that which took place and passed between them."

An offer and acceptance seemed to have been concluded in *May* v. *Thompson* (20 Ch. D. 705); but it was the sale of a doctor's practice; and the doctor in accepting wrote to V.'s agent: "I will pay on receipt of corrected agreement;" and to V., "I shall trust to you to give me the best introduction you can during the three months, and afterwards;" and subsequent letters showed that this matter was never settled. As "introductions" and "restrictive covenants" (which had not been mentioned) are all that a doctor has to sell, it was held that this language—vague though it was—clearly implied disagreement about the most vital terms, and that, therefore, there was no agreement. Jessel, M.R., said, "I think the decisions of our Courts as to letters have gone quite far enough, that is, in the spelling out of a contract from letters when both parties intended a formal contract to be executed. I think it very often happens that both parties use expressions in letters which, read alone, would amount to a contract, if we did not know that in fact neither of the parties intended those general expressions to constitute a contract; and in that case, if the Court lays hold of the language of the letters to make a contract, it makes a contract for the parties which the parties never intended to enter into."

In *Bristol, etc., A. B. Co.* v. *Maggs* (44 Ch. D. 616), a baker sold and the company bought a shop; the contract seemed complete in two letters. After which the company wrote a third letter, introducing a new and vital term, namely, a restriction upon the baker trading in the district. It was held that the three letters read together negatived the idea that the two letters constituted a contract. This case is overruled on another point, *post*, p. 349. Compare *Nesham* v. *Selby*, *supra*; *Post* v. *Marsh* (16 Ch. D. 395); *Williams* v. *Brisco* (22 Ch. D. 441). Contrast *Bellamy* v. *Debenham* ([1891] 1 Ch. 412), where it was held that the correspondence, although reopened on the subject of title, yielded a contract.

Withdrawal of offer.

In connection with the subject of contracts by correspondence, it may be useful to bear in mind the following principles of law:—An offer to sell property may be withdrawn by V. before acceptance without formal notice. Withdrawal is effected at the moment when it is brought to P.'s notice by receipt of V.'s letter or by P.'s actual knowledge that V. has done something inconsistent with the continuance of the offer, as by selling to a third person: *Dickinson* v. *Dodds* (2 Ch. D. 463); *Bolton Partners* v. *Lambert* (41 Ch. D. 295) (ratification *nunc pro tunc*; contrast *Dibbins* v. *D.* ([1896] 2 Ch. 348)); *Henthorn* v. *Fraser* ([1892] 2 Ch. 27).

Post office the agent of both parties.

It is now settled, by the *Household Fire Co.* v. *Grant* (4 Ex. D. 216)†, citing *Dunlop* v. *Higgins* (1 H. L. C. 381), etc., that "the post office is the common agent of both parties," and that as soon as a letter of acceptance is delivered to the post office, the contract is made as complete as if the acceptor had put his letter into the hands of a messenger sent by the offerer himself as his agent to deliver the offer and receive the acceptance. See Chitty on Contracts, 13th ed. p. 13 *et seq.*

What writings are sufficient.

Chairman's minutes, *Jones* v. *Victoria Co.* (2 Q. B. D. 314), instructions for a telegram, *Godwin* v. *Francis* (L. R. 5 C. P. 295), a letter to a third party, initials (Fry, S. P. sects. 555, 518) pencil, print, an affidavit in another action (Fry) or a recital in a will are sufficient notes in writing: *In re Hoyle* ([1893] 1 Ch. 84). The document must be signed, not subscribed, but the signature must govern the whole document: per Lord Westbury, *Caton* v. *C.* (L. R. 2 H. L. 127). If two documents are necessary they should be capable of being referred to one another: *John Griffiths Corp.* v. *Humber*, *supra*; *Clinan* v. *Cooke* (1 S. & L. 21) (advertisement); *Long* v. *Millar* (4 C. P. D. 450) (receipt); *Nene Valley D. Com.* v. *Dunkley* (4 Ch. D. 1) (plan); *Ridgway* v. *Wharton* (6 H. L. C. 238).

The writings need not be contemporaneous.

The writings need not be contemporaneous, but "it cannot be enough merely to say in writing that there was a previous parol agreement; it must be proved that there was such an agreement, and to let in such proof is precisely what the statute meant to forbid:" *per* Lord Cranworth, *Warden* v. *Jones* (2 De G. & J. 85); cited by Jessel, M.R., *Trowell* v. *Shenton* (8 Ch. D. 318, 324); and agent's signature must be made before his authority is withdrawn, *Bell* v. *Balls* ([1897] 1 Ch. 663); the writings must be made before action brought: *Lucas* v. *Dixon* (22 Q. B. D. 357).

See Fry on Specific Performance, pp. 126 *et seq.*, pp. 252 *et seq.*

II. Part Performance.

The *Statute of Frauds* does not avoid the contract:

It has long since been held that the *Statute of Frauds* does not avoid the contract, but only prevents it being proved. For instance, if a clerk contracts verbally to serve for over a year, what he does is referred to the unenforceable contract, and no other contract is implied: *Britain* v. *Rossiter* (11 Q. B. D. 123). Further, if there is part performance by the party seeking relief, and to the knowledge of the other party, proof will be admitted of the verbal contract in cases where an action for specific performance would lie. But part performance is only an exception to the plea of the *Statute of Frauds* in an action for specific performance: *Lavery* v. *Pursell* (39 Ch. D. 508), citing *In re Northumberland Avenue H. Co.* (33 Ch. D. 16).

acts of part performance make it enforceable in spite of the statute.

The refusal of the Court of Chancery to be bound by the 4th section of the *Statute of Frauds* where there were acts of part performance was at first applied to any acts, including (down to 1747) part payment. Lord Blackburn said that it was as though the Court had interpolated words into the sanction, and said, "I should not hesitate if it was *res integra* in refusing to interpolate such words or put such a construction on the statute:" l.c. (8 A. C. 489). Lord Selborne, L.C., pointed out in the same case the real ground of equitable intervention, and the real reason why its scope had shrunk, as follows:—

There was an irrevocable act—what in Scotch law is called "*interventus rei*"—which had lifted the contract out of the sphere of pure contract, so that the Court had to choose "between undoing what has been done (which is not always possible, or if possible, just) and completing what has been left undone" (p. 476). Accordingly, the "*res gesta*" "must be such" (in Lord Hardwicke's words, cited by Lord Selborne, L.C., p. 478), "as could be done with no other view or design than to perform the agreement;" there must be some "*evidentia rei*"—which means that the act must speak for itself—so as to connect itself with the agreement. And further, the act must change the relative positions of the parties towards the subject-matter of the agreement. Every case in which equity held that there was no part performance, every instance of the shrinkage of equity from the position it had once taken up, was an illustration of these two fundamental principles.

But these acts must not be—

Lord Selbourne then classed these cases, where the acts were not treated by equity as part performance, under five heads.

1. Ancillary;

1. Acts preparatory to the completion of a contract, ancillary or introductory acts as they are sometimes called, *e.g.* delivery of abstracts, going to view an estate, etc.: *Clerk* v. *Wright* (1 Atk. 13), and *Whaley* v. *Bagnel* (1 Bro. P. C. 345). (Add, execution by V., only, of the Indenture: *Phillips* v. *Edwards* (33 B. 444, *et seq.*)).

2. Ambiguous;

2. Where the act is explicable on other grounds, *e.g.* "the mere holding over by a tenant, unless qualified by the payment of a different rent:" *Wills* v. *Stradling* (3 Vesey, 381). (Compare *Nunn*

v. *Fabian* (1 Ch. 35), cited in *Humphreys* v. *Green* (10 Q. B. D. 148, 157); *Miller* v. *Sharp* ([1899] 1 Ch. 622); or qualified by expenditure inconsistent with a tenancy from year to year on the old terms: *Sutherland* v. *Briggs* (1 Ha. 26). In these a change of possession manifests itself, as clearly as when V. goes and P. comes, see pp. 264, 368, 387: and manifest change of possession, alone, is sufficient to exclude the statute: *Morphett* v. *Jones* (1 Sw. 172); *Millard* v. *Harvey* (34 B. 237) (sale); *Pain* v. *Coombs* (1 D. & J. 34); *Miller* v. *Finlay* (5 L. T. 510) (lease); *Ungley* v. *U.* (5 Ch. D. 887). In *Hodson* v. *Heuland* ([1896] 2 Ch. 428) the order of events was possession, (valid) parol contract, new rent. Contrast *Parker* v. *Smith* (1 Coll. 608). In *Williams* v. *Evans* (19 Eq. 547) possession plus expenditure by P.'s lessee was enough. In *Lamare* v. *Dixon* (L. R. 6 H. L. 414) this change of possession, plus payment of rent, was under protest, and, therefore, not enough).

3. Negative.

3. Where the act is negative; as in *Lamas* v. *Bayley* (2 Vern. 627) where P^{i}., being engaged in a treaty for the purchase of land, desisted in order that P^{ii}. might buy it in order to resell a part of it to P^{i}. (The same circumstances recurred in *Chattock* v. *Muller* (8 Ch. D. 177), where Malins, V.C., evaded this principle by deciding that P^{ii}. bought as trustee for P^{i}. But this is contrary to sect. 7 of the *Statute of Frauds*. See *James* v. *Smith* ([1891] 1 Ch. 384), where the facts were similar. Malins, V.C., had thought himself bound by *Heard* v. *Pilley* (4 Ch. 548); but in the latter case P^{ii}. had only contracted to buy, and was still agent; in *Chattock* v. *Muller* and *James* v. *Smith* the agency had ceased, for P^{ii}. had already bought the land with his own money.)

4. Conditions precedent.

4. Where the act is a condition precedent; *e.g.* in *O'Reilly* v. *Thompson* (2 Cox, 271) P^{ii}. had obtained from P^{i}. a release of a right to a lease by V. to P^{i}., on an agreement with V. that V. would let the same premises to P^{ii}.

5. Payment of money.

5. Lord Hardwicke's decisions that payment of a part of the purchase-money is an act of part performance are no longer law: *Clinan* v. *Cooke* (1 Sch. & Lef. 22); *Watt* v. *Evans* (4 Y. & C. Ex. 579, Appx.); and according to *Britain* v. *Rossiter* (*infra*), *Hughes* v. *Morris* (2 D. M. &. G. 356), payment of the whole is not part performance.

6. Nor is marriage part performance.

A sixth class must be added: for it has been settled by a series of authorities, among which may be mentioned *Lassence* v. *Tierney* (1 Mac. & G. 551), *Warden* v. *Jones* (2 De G. & J. 76), *Caton* v. *C.* (1 Ch. 137; L. R. 2 H. L. 127), that marriage is not an act of part performance which will take a parol contract out of the statute.

Lord Selborne brought *Muddison* v. *Alderson* under each of the first four heads, and therefore refused specific performance.

Lord Blackburn: single rule.

Lord Blackburn summed up the rule with its six exceptions in one simple formula: part performance is change of possession. Mere change of possession, as we saw, excludes the statute; and where there is no change of possession, expenditure of money on improvements will not exclude the statute: *Frame* v. *Dawson* (14 V. 386). This formula gives a safe clue to all the cases about land. It is still a question whether other cases of part performance exist.

To what interests it is applicable.

It was stated by the C. A. in *Britain* v. *Rossiter* (11 Q. B. D. 123) that the equity of part performance does not extend to contracts concerning any other subject-matter than land. It was pointed out, however, by Lord Selborne in the l.c. (8 A. C. 474) that this statement is scarcely reconcilable with the view expressed by Lord Cottenham in *Hammersley* v. *De Biel* (12 Cl. & F. 64, n.) and in *McManus* v. *Cooke* (35 Ch. D. 681, 697)†, Kay, J., after elaborately reviewing the authorities, stated that they seemed to establish the following propositions:—

"(1.) The doctrine of part performance of a parol agreement, which enables proof of it to be given notwithstanding the *Statute of Frauds*, though principally applied in the case of contracts for the sale or purchase of land, or for the acquisition of an interest in land, has not been confined to those cases. (2.) Probably it would be more accurate to say it applies to all cases in which a Court of Equity would entertain a suit for specific performance if the alleged contract had been in writing. (3.) The most obvious case of part performance is where the defendant is in possession of land of the plaintiff under the parol agreement. (4.) The reason for the rule is that where the defendant has stood by and allowed the plaintiff to fulfil his part of the contract, it would be fraudulent to set up the statute. (5) But this reason applies wherever the defendant has obtained and is in possession of some substantial advantage under a parol agreement which, if in writing, would be such as the Court would direct to be specifically performed. (6.) The doctrine applies to a parol agreement for an easement, though no interest in land is intended to be acquired."

Accordingly, Kay, J., granted a mandatory injunction to enforce a contract for an easement, although easements are not interests in land, but are (?) contracts not to be performed in a year, within the meaning of the 4th section.

Companies and corporations.

The doctrine of part performance applies to companies and corporations, as well as to individuals: *Wilson* v. *West Hartlepool Ry. Co.* (2 De G. J. & Sm. 475).

NOTE.

Statute of Frauds, s. 4.

The 4th section of the *Statute of Frauds* provides (*inter alia*) that "no action shall be brought to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized." The same section applies to agreements upon consideration of marriage, *Caton* v. *C.*, agreements not to be performed within a year, *Britain* v. *Rossiter*, *McManus* v.

Cooke (*ubi supra*), and guarantees *In re Hoyle* (*ubi supra*). The section does not apply to cases of mistake, *Johnson* v. *Bragge* ([1901] 1 Ch. 28); fraud, *Mestaer* v. *Gillespie* (11 V. 627); and cases cited p. 27. Contracts in consideration of land contracts: *Erskine* v. *Adeane* (8 Ch. 756); *Angell* v. *Duke* (L. R. 10 Q. B. 174); *Morgan* v. *Griffith* (L. R. 6 Ex. 70), or of ante-nuptial contracts, *Hammersley*, v. *De Biel* (12 Ch. & F. 45); *Coverdale* v. *Eastwood* (15 Eq. 121), but see *Dashwood* v. *Jermyn* (12 Ch. D. 776); *In re Badcock* (17 Ch. D. 361); Pollock "Contracts," App. K., have been held to be outside it, and resulting secret implied and constructive trusts are excluded by sect. 8. Parol evidence may be adduced to prove that what is apparently a signed enforceable contract is only a term in a parol unenforceable contract: *Jervis* v. *Berridge* (8 Ch. 351); or that a phrase has an unusual meaning, *Webster* v. *W.* (4 D. M. & G. 437). The statute must be pleaded (R. S. C. Order 19, r. 15); and if one section is pleaded reliance cannot be placed on another section: *James* v. *Smith* ([1891] 1 Ch. 384). See *ante*, pp. 26, 27.

Agreement for a Lease.

WALSH *v.* LONSDALE.

(21 Ch. D. 9.)

Principile.

Since the Judicature Acts a tenant holding under an agreement for a lease, of which specific performance would be decreed, stands in the same position as if the lease had been executed.

Summary of facts.

Lonsdale agreed to grant, and Walsh agreed to take, a lease of a mill called the Providence Mill for seven years at a rent of 30*s.* a year for each loom, the looms not to be less after the first year than 540. The lease was to contain a stipulation that there should always be payable in advance on demand one whole year's rent in addition to the rent, if any, due for the period down to the date of the demand. Walsh was let into possession of the premises, and in 1881 was running 560 looms for which he paid £840 rent, but not in advance. Lonsdale then served a notice demanding payment of £840 for one whole year's rent of the mill in advance, *plus* £165 14*s.* for rent which had accrued since the last quarter-day. Two days later Lonsdale put in a distress for the amount demanded. The C. A. decided that Walsh, while holding under an agreement for a lease, was subject to the same right of distress as though a lease containing the same stipulations had been granted.

Agreement for a lease interpreted as a lease.

The principle on which the decision in this case is based is thus stated by Jessel, M.R.: "There is an agreement for a lease under which possession has not been given. Now since the *Judicature Act* the possession is held under the agreement, there are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one Court, and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds therefore under the same terms as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance. That being so, he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted. On the other hand he is protected in the same way as if a lease had been granted; he cannot be turned out by six months' notice as a tenant from year to year. He has a right to say, 'I have a lease in equity, and you only re-enter if I have committed such a breach of covenant as would, if a lease had been granted, have entitled you to re-enter according to the terms of a proper proviso for re-entry.' That being so, it appears to me that, being a lessee in equity, he cannot complain of the exercise of the right of distress merely because the actual parchment has not been signed and sealed."

Ground Game Act, 1880, 43 & 44 Vict. c. 47.

In *Allhusen* v. *Brooking* (26 Ch. D. 559) the question was whether the landlord's right to the ground game on the land was preserved by the saving clause (sect. 5) of the *Ground Game Act*, 1880, which is as follows:—"Where at the date of the passing of this Act the right to kill and take ground game on any land is vested by lease, contract of tenancy, or other contract *bonâ fide* made for valuable consideration in some person other than the occupier, the occupier shall not be entitled under this Act, until the determination of that contract, to kill and take ground game on such land." The tenant had an equitable interest under an agreement, prior to the Act, for a lease for fourteen years, which was to commence after the Act and reserved to the landlord the sole right to kill hares and shoot rabbits. It was held that an agreement for a lease was included under the word "lease," and that the reservation of the game thus came within the saving clause. As for the question of date, "such a covenant . . . creates an equitable estate from the time of its execution:" per Jessel, M.R., *Moore* v. *Clench* (1 Ch. D. 452).

Bankruptcy Act, 1883, s. 55.

On the same principle, it was decided in *Ex p. Monkhouse* (14 Q. B. D. 956) that the right of a trustee in bankruptcy to disclaim property of an onerous character, under sect. 55 of the *Bankruptcy Act*, 1883—which is now to be read with sect. 13 of the *Bankruptcy Act*, 1890 (53 & 54 Vict. c. 71), extended to an agreement for a lease. Field, J., in delivering judgment, said: "Since the *Judicature Acts* there is now no distinction between a lease and agreement for a lease, because equity looks upon that as done which ought to be done. Consequently after the execution of the agreement for a lease, this debtor had a property vested in him, that is to say, he had land which was burthened with onerous covenants." The observation of the learned judge must, however, be read with the qualification established by *Swain* v. *Ayres* (21 Q. B. D. 289, 294) and *Coatsworth* v. *Johnson* (55 L. J. Q. B. 220; 54 L. T. 520), that the agreement for a lease must be one of which specific performance would be ordered, and with the qualification established by *Foster* v. *Reeves* ([1892] 2 Q. B. 255), that the Court before which the action comes must have adequate equitable jurisdiction, so that the rule does not apply to County Courts where the subject-matter of the agreement exceeds £500 in value.

Conveyancing Act, 1881, s. 14.

Covenants conferring a benefit as well as covenants imposing a burden upon the tenant begin from the moment that the agreement for a lease can be specifically enforced: *Lowther* v. *Heaver* (41 Ch. D. 248, 264); so that a tenant will not incur forfeiture on breach of any condition in his agreement for a lease except subject to the exemptions contained in the *C. Act*, 1881, s. 14 (*ante*, p. 68): *Strong* v. *Stringer* ([1889] W. N. 135); and see now *C. Act*, 1892, s. 5; and he is entitled to "reasonable notice" to determine his agreement for a tenancy from year to year: *Lowe* v. *Adams* ([1901] 2 Ch. 598); and his assigns can be sued on his restrictive covenants: *Manchester Co.* v. *Coombs* ([1901] 2 Ch. 608); *In re Birmingham, etc., Co. and Allday*, *infra*. On the other hand an agreement to assign does not make the equitable assign assign of the land within the meaning of Spencer's case, or of options to purchase, unless the landlord accepts him as such: *Friary, etc., Breweries* v. *Singleton* ([1899] 1 Ch. 86; 2 Ch. 261). Covenants by a lessee not to "assign," *Gentle* v. *Faulkner* ([1900] 2 Q. B. 267), or for himself and "his assigns," *Ramage* v. *Womack* ([1900] 1 Q. B. 116), refer only to legal assignments.

Vendor and purchaser summons.

A vendor and purchaser summons (*ante*, p. 330), is only available with regard to purchases of real or leasehold estates; but leasehold estates include estates agreed to be granted on lease: *In re Anderton and Milner's C.* (45 Ch. D. 476); *In re Lander and Bagley's C.* ([1892] 3 Ch. 41).

Construction.

Agreements for leases are construed like other executory deeds (*ante*, pp. 32 *et seq.*), loosely, unless they specify the clauses verbatim as in *N. E. Railway Co.* v. *Hastings* ([1900] A. C. 260). "Usual covenants" include provisoes for re-entry on non-payment of rent only, *In re Anderton* v. *Milner's C.*; *In re Lander and Bagley's C.*, and not for not assigning without consent, residing on the premises, etc., *ib.*

Solicitors' Remuneration Act, 1881.

In *In re Emanuel and Simmonds* (33 Ch. D. 40) it was decided that the scale fee prescribed by Part II. of Schedule I. to the General Order of August, 1882, under the *Solicitors' Remuneration Act*, 1881, to be paid to a lessor's solicitor "for preparing, settling, and completing lease and counterpart," includes the solicitor's remuneration for the preparation of a prior agreement for the lease, and the solicitor cannot make an additional charge for the preparation of the agreement, and this decision was approved by the House of Lords in *Savery* v. *Enfield Local Board* ([1893] A. C. 218). Where lessees or purchasers are many, the fees are many: *In re Thomas* ([1900] 1 Ch. 454). Underlease may mean sale: *In re Webb* ([1897] 1 Ch. 144).

An analogy from sale of freeholds,

The following cases are merely cited for their analogy to the above cases:—

A purchaser of land brought an action for damages at *Nisi Prius* against his vendor, for damage done to the land between the date of the contract and completion. The Court held that the vendor—between those two dates—was trustee for the purchaser; and the equitable title of the purchaser was sufficient to support the action: *Clarke* v. *Ramuz* ([1891] 2 Q. B. 456); following *Phillips* v. *Silvester* (8 Ch. 173).

A purchaser of land at an auction is, before completion, entitled to the benefit of restrictive covenants attached to the land: *In re Birmingham, etc., Co. and Allday* ([1893] 1 Ch. 342). See *supra*, *Manchester Co.* v. *Coombes*, *post*, p. 355 *et seq.* It follows, therefore, that he can bring an action against the persons subject to the burden of the same covenants.

A vendor after a contract for sale may not eject tenants against purchaser's wish: *Raffety* v. *Schofield* ([1897] 1 Ch. 937, 945).

A vendor of a house before completion is entitled to insurance moneys on his house, if then burnt down: *Rayner* v. *Preston* (18 Ch. D. 1), but see *ante*, pp. 295, 298.

partnership,

A sale by a partner (V.) to P., to which the co-partners object, and which takes effect under the Partnership Act, 1890, s. 31, makes V. trustee for P., and P. liable to indemnify V.: *Dodson* v. *Downey* ([1901] 2 Ch. 620).

goodwill.

A contract to sell goodwill was not a sale thereof under the *Stamp Acts*, *C. I. R.* v. *Angus* (23 Q. B. D. 579), but the Act of 1891 now includes contracts for sale.

Sale of Goodwill.

TREGO *v.* HUNT.

([1896] A. C. 7.)

Principle.

In a sale of goodwill the vendor will be restrained from soliciting his former customers; and a retiring partner who agrees that his former partner shall retain the goodwill lies under the same obligations.

Summary of facts.

In 18~~9~~89, A. Trego and Smith entered into a partnership for seven years with Hunt; the goodwill was to remain A. Trego's property. In December, 1894, Hunt employed a clerk of the firm out of office hours to copy the names and addresses of the firm's customers, in order that when the partnership expired he might canvass them on his own account. The House of Lords granted an injunction against Hunt from doing so.

History of the doctrine.

"Goodwill," said Lord Eldon, in *Cruttwell* v. *Lye* (17 Ves. 335), "is nothing more than the probability that the old customers will resort to the old place." Wood, V.C., expanded the definition to include "every positive advantage that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on or with the name of the late firm or with any other matter carrying with it the benefit of the business: *Churton* v. *Douglas* (Joh. 174, 188). See *West London Synd.* v. *C. I. R.* ([1898] 2 Q. B. 507, 523). Cotton, L.J., descending from the abstract to the concrete, said in *Pearson* v. *P.* (27 Ch. D. 145), "It is admitted that a person who has sold the goodwill of his business may set up a similar business next door and say that he is the person who carried on the old business, yet such proceedings manifestly tend to prevent the old customers going to the old place." Goodwill is still valued on this assumption: *Page* v. *Ratliffe* (74 L. T. 343; *In re David and Matthews* ([1899] 1 Ch. 355). "I cannot see where to draw the line. If he may by his acts invite the old customers to deal with him and not with the purchaser, why may he not apply to them and ask them to do so?"

The question was suggested by Lord Romilly's decision in *Labouchere* v. *Dawson* (13 Eq. 322) [1871], that the ex-partner may not apply to the old customers privately—by letter, personally, or by traveller—if he has sold to his former partners the goodwill, although he may compete with them in any other way. This case went beyond any other case which preceded it (see *Pearson* v. *P.*, pp. 150, 153, 159), and practically established a new equity deduced (like restrictive covenants), from the old principle that a man may not derogate from his grant.

In *Ginesi* v. *Cooper* (14 Ch. D. 596), Jessel, M.R., commenced his judgment by citing the observation of James, L.J., that the command "Thou shalt not steal" is as much a portion of the law of Courts of Equity as it is of Courts of Law, and indicated his surprise that the proposition that a trader who had sold for value his business and goodwill to another man is entitled, notwithstanding, to solicit his old customers to deal with him just as if no sale had ever taken place. The injunction, however (the form of which is given, 14 Ch. D. 603), did not restrain dealing with old customers. In *Leggott* v. *Barrett* (15 Ch. D. 306), the C. A. reversed the decision of Jessel, M.R., who had restrained the former partner from dealing with old customers; but there was no appeal from his decision restraining solicitation of old customers. "To enjoin a man," said Brett, L.J., "or to prevent him by means of damages when he does it, against dealing with people whom he has not solicited, is not only to enjoin him, but to enjoin them, for it prevents them from having the liberty which anybody in the country might have of dealing with whom they like." A new point of departure in the doctrine was reached by *Walker* v. *Mottram* (19 Ch. D. 355), where the C. A. decided (affirming Jessel, M.R.) that where the goodwill had been sold compulsorily, by the trustees in bankruptcy, the bankrupt could not be restrained from soliciting the customers of the old business, the obligation being in the nature of a personal obligation and not an incident of the transfer of property. Compare *Mogford* v. *Courtenay* (29 W. R. 864).

Then came *Pearson* v. *P.* (27 Ch. D. 145), 1884, which nipped the new equity in the bud and overruled *Labouchere* v. *Dawson*. Lindley, L.J., however, based his decision on the peculiar wording of the covenant that nothing should prevent the vendor "from carrying on the business at such place as he thought fit and under the name of James Pearson," and on the absence of any express reference to goodwill. In the *Bristol A. B. Co.* v. *Maggs* (44 Ch. D. 616), Kay, J., followed *Pearson* v. *P.*, and now *Pearson* v. *P.* is overruled and *Labouchere* v. *Dawson* restored, and the very language of its order repeated.

Goodwill defined.

In the l.c. it was decided "that the idea of goodwill and what is comprised in the sale of a business has silently been developed and grown since the days of Lord Eldon" (p. 27, per Lord Davey). Lord Herschell approved of Jessel's (M.R.) definition of it in *Ginesi* v. *Cooper* as "the formation of that connection which has made the value of the thing that the late firm sold;" and which often, as in *Ginesi* v. *Cooper*, is the only thing saleable. Lord Macnaghten said the goodwill is often "the very sap and life of the business, without which the business would yield little or no fruit." It is the advantage "of the reputation and connection of the firm which may have been built up by years of honest work or gained by lavish expenditure of money." And he defined the duties of the vendor or retiring partner thus: "He may not sell the custom and steal away the customers. It is not an honest thing to pocket the price and then to recapture the subject of sale, to decoy it away or call it back before the purchaser has had time to attach it to himself and make it his very own." But on the other hand, "he may do everything that a stranger to the business in an ordinary course would be in a position to do. He may set up where he will. He may push his wares as much as he pleases."

Recent cases.

A purchase of goodwill confers (*a*) the right to the order in *Trego* v. *Hunt;* (*b*) the right to use the old trade name, *Levy* v. *Walker* (10 Ch. D. 436); *Thynne* v. *Shove* (45 Ch. D. 577); (*c*) but not so as to involve a living person whose name is part of the firm name in possible liability (*ib.*), explaining *Gray* v. *Smith* (43 Ch. D. 208); *Burchell* v. *Wilde* ([1900] 1 Ch. 557); *Townsend* v. *Jarman* ([1900] 2 Ch. 698); (*d*) nor so as to mislead, *post*, p. 379; (*e*) the right to sue on covenants not to trade within 40 miles, etc., *Townsend* v. *Jarman*, citing *Jacoby* v. *Whitmore* (49 L. T. 335).

On a dissolution of partnership, goodwill not being mentioned, (1) the party entitled to the assets is entitled to (*a*) and (*b*) subject to (*c*) and (*d*), *Jennings* v. *J.* ([1898] 1 Ch. 378); *In re David & Matthews* ([1899] 1 Ch. 378); (2) if neither are so entitled, each enjoys (*b*) subject to (*c*) and (*d*), *Burchell* v. *Wilde* ([1900] 1 Ch. 551)†, citing *Banks* v. *Gibson* (34 B. 566), etc.

Semble the same rule applies to sales and dissolutions where goodwill is expressed or implied in the sales or disposition of assets, but see *Gray* v. *Smith*, *supra*.

Semble the proviso introduced on a compulsory sale has not the effect of the proviso in *Pearson* v. *P.*, to which Lindley, L.J., referred in that case, so that such sales, etc., are under the same rules as voluntary sales: *In re David & Matthews* ([1899] 1 Ch. 385), but see *Jennings* v. *J.* ([1898] 1 Ch. 389), citing *Johnson* v. *Helleley* (2 D. J. & S. 446).

A proviso that the retiring partner may set up for himself in the same business has not the effect of that in *Pearson* v. *P.*: *Gillingham* v. *Beddow* ([1900] 2 Ch. 242).

Dependency of goodwill.

It seems that on a conveyance goodwill will almost necessarily pass by implication because of its dependent, one might say parasitic, existence.

"If there is one attribute common to all cases of goodwill it is the attribute of locality. For goodwill has no independent existence:" per Lord Macnaghton in *C. I. R.* v. *Muller* ([1901] A.

C. 224). "The goodwill of the business will pass to the purchasers not by this instrument, but as soon as the real estate to which the goodwill is attached has passed to them:" per Lord Esher, M.R.; *C. I. R.* v. *Angus* (23 Q. B. D. 594).

Thus on a sale of a public house its goodwill passes by implication, *Ex p. Punnett* (16 Ch. D. 226), almost like a fixture would; and, like a fixture, if that to which it is attached is foreign, it is foreign too, *C. I. R.* v. *Muller* ([1900] 1 Q. B. 310, [1901] A. C. 217); and if it is attached only to an English contractual right it is English, *Danubian Sugar Factories* v. *C. I. R.* ([1901] 1 Q. B. 245). But goodwill may be sold or contracted to be sold as a separate entity: *Baglioni* v. *Cavalli* (83 L. T. 500), though perhaps, like trademarks, not to a purchaser other than the owner of the business; and in such a case it ranks as personal property for purposes of Stamp Duty, *West London Syndicate* v. *C. I. R.* ([1898] 2 Q. B. 507); and a mortgage of a lease of a public house does not carry goodwill (unless so expressed) until the mortgagee takes possession, *In re Bennett* ([1899] 1 Ch. 316); or, if he is also mortgagee of the business, appoints a receiver, *Whitley* v. *Challis* ([1892] 1 Ch. 64).

Compare the cases grouped around contract of service in the chapter on Injunctions, and especially *Robb* v. *Green* ([1895] 2 Q. B. 315), where the facts were very similar; but the "retiring partner" of *Trego* v. *Hunt* was represented in *Robb* v. *Green* by a manager, and the decision was based on terms implied in a contract for confidential service instead of on the terms implied by a sale. See *post*, pp. 379, 380 (negative stipulation).

RESTRAINT OF TRADE.

If the purchaser of a goodwill desires to exclude or limit open competition on the part of his vendor, within the meaning of *Churton* v. *Douglas* (*supra*), an express contract to that effect within the meaning of the *Bristol, etc., A. B. C.* v. *Maggs* (*supra*), and *May* v. *Thompson*, *ante*, p. 339, is still necessary. But a contract or covenant in restraint of competition is considered a contract or covenant in restraint of trade, and as such is watched with much jealousy.

Covenants in restraint of trade.

Covenants in restraint of trade rest on public policy; in interpreting which chancery judges, etc., have not quite seen eye to eye with judges trained in the K. B. D. The divergence of view came to a head in *Maxim Nordenfelt Co.* v. *Nordenfeldt* ([1893] 1 Ch. 630)*.

There was a maxim that covenants of world-wide restraint or restraint throughout England are necessarily void. The reasons for and the exceptions to the invalidity of such a covenant were discussed in this case.

Lord Bowen's view of the *Nordenfelt* case.

In this case defendant covenanted for what was practically the rest of his life, not to make guns or ammunition anywhere except for plaintiffs, they covenanting to employ him for seven years only; he might, however, prosecute other branches of his industry and make torpedoes. This contract, after the seven years were over, was declared valid by most of the Law Lords and Lord Justices, on the double ground that it was not against public policy and not unreasonable. But Bowen, L.J., who represented the views of the K. B. D., after reviewing all the authorities, based his decision on the first ground only. "Rules," he said, "which rest upon the foundation of public policy, not being rules which belong to the fixed or customary law, are capable on proper occasion of expansion and modification." It was the elasticity of rules of public policy which made Burrough, J., say in despair, "Public policy is a very unruly horse, and when once you get astride of it you never know where it will carry you. It may lead you from the sound law," *Richardson* v. *Mellish* (2 Bingh. 252); and which made Lord Bramwell adopt Cave, J.'s caution: it is "a branch of the law which certainly should not be extended, as judges are more to be trusted as interpreters of the law than as expounders of what is called public policy," *Mogul Steamship Co.* v. *McGregor* ([1892] A. C. 25, 45). But in the group of cases discussed in the *Nordenfelt* case, Bowen, L.J., proved that elasticity was a symptom of adaptability, not caprice, and resulted from rational progress and not arbitrary change. Thus the precedents prove that these rules do not exist wherever the reason for their existence is absent—to take one instance, (*a*) wherever trade secrets are assigned, and, to take another instance, (*b*) wherever the business or goodwill of a business like Nordenfelt's is sold; for "trade cannot suffer by the substitution of one possessor of a secret for another" (p. 666). Moreover, cases where the rule does not exist have been progressively discovered during the last three centuries. Thus the idea (*c*) that "particular" or "partial" restraints *may* be good, has itself been gradually carved out of the older idea that all restraints are bad; and precedent after precedent has at last established that "restraints which involve only a limit of places at which, of persons with whom, or of modes in which the trade is to be carried on, are valid when made for a good consideration and where they do not extend further than is necessary for the reasonable protection of the covenantee." Or put the matter thus: First comes an universal No; then negatives to this negative, and they fall into two groups (1) worldwide restraints, as to which you never ask, Are they reasonable? (2) partial restraints, as to which you always ask, Are they reasonable? Indeed, up till 1837, the adequacy of the consideration was inquired into; although, *pace* Lord Macnaghten (p. 565), in inquiring into reasonableness the Court will no longer inquire into the adequacy of the consideration: *Collins* v. *Locke* (4 A. C. 674, 686).

Thus, then, it was that that portion of our common law which is law merchant grew not by rule upon rule, but by exception upon exception; and the result is the somewhat pedantic system expounded by Lord Bowen.

Lord Macnaghten's view.

Lord Macnaghten based his decision exclusively on the ground of reasonableness, and pointed out, in opposition to Bowen, L.J., that the proposition that restraints, unlimited as to space, are void, though supported by innumerable *dicta*, rest on three cases only—*Ward* v. *Byrne* (5 M. & W. 548); *Horner* v. *Graves* (7 Bingh. 735; and *Allsopp* v. *Wheatcroft* (15 Eq. 59)—and that these three cases were also discussed from the point of view of the reasonableness of the contract. On the other hand, *Whittaker* v. *Howe* (3 Beav. 383) (as cited by Lord Macnaghten, p. 572); *Wallis* v. *Day* (2 M. & W. 273), compare *Mogul S. S. Co.* v. *McGregor* (*ubi supra*) (exclusive service); *Jones* v. *Lees* (1 H. & N. 189) (mode of manufacture); *Leather Cloth Co.* v. *Lorsont* (9 Eq. 345) (trade secrets); *Roussillon* v. *R.* (14 Ch. D. 351) (Fry, J.); *Badische Anilin und Soda Fabrik* v. *Schott* ([1892] 3 Ch. 447) (Chitty, J.);—were all cases of world-wide restraint and were valid.

The two views compared.

The practical value of this dispute may be easily overrated. Thus (1) all these last-mentioned cases, except the first and perhaps the last two, can be supported on L.J. Bowen's reasoning; but can the last two cases be supported at all? In this same *Nordenfelt* case a covenant not to engage in any business liable to compete with that of the company was held void by the C. A., and their decision was not appealed against; and the actual decision in the House of Lords left some congenial field open for defendant's activity. But in *Roussillon* v. *R.* and the *Badische Anilin, etc.* v. *Schott*, defendant renounced the only trade he had ever learnt, and the practical effect of his contract was the same as that of the contract declared bad by the C. A. in the *Nordenfelt* case. (2) Again, the reasoning of Bowen, L.J., is not satisfactory. Thus, if Nordenfelt had contracted to serve the company and no one else, and the company to employ Nordenfelt for the rest of his life, this would have been on all fours with *Wallis* v. *Day* (2 M. & W. 273); and Bowen, L.J., gives this case as an instance of partial restraint, to which the test of reasonableness must be applied. If so, it is mere sophistry to argue that the *Nordenfelt* case is a case of general restraint, though it differs only from *Wallis* v. *Day* in mutuality, and in the partial omission of the affirmative term. Again, he classes contracts not to carry on the manufacture which was the subject of such and such a patent in Europe (*Leather Cloth Co.* v. *Lorsont*) as a general exception to world-wide restraint; and contracts not to make machines without using a specified invention (*Jones* v. *Lees*) as a particular restraint. These thin distinctions are surely doomed. (3) Can a case be conceived where a contract of world-wide restraint will harmonize with general policy and yet be thought unreasonable? If yes, Bowen, L.J., would hold such a contract good; Lord Macnaghten bad. Then the matter would be clenched. Until then the discussion is academic, and Lord Macnaghten's simple sense may be preferred to L.J. Bowen's cumbrous scholasticism. In either case a contract (like that of Heyse's Hainkönig in Kinder de Welt), which may involve industrial suicide, will lie under the gravest suspicion, both on the ground of public policy and of private reasonableness. See too Lindley, M.R.'s judgment in *Mills* v. *Dunham* ([1891] 1 Ch. 586) cited by Romer, L.J., in *Haynes* v. *Doman* ([1899] 2 Ch. 31); and his and Rigby, L.J.'s judgments in *Underwood* v. *Barker* (*infra*), which support Lord Macnaghten's view.

Other recent cases.

(2) The following examples explain themselves:—(1) A contract to serve one master for five or ten years and not to do any other business for that period is enforceable by injunction during service only: *Robinson* v. *Heuer* ([1898] 2 Ch. 451); *Ehrman* v. *Bartholomew* ([1898] 1 Ch. 671). A contract prohibiting a former employee from working in or starting any business in a limited area without the employer's consent, such consent not to be withheld if the business is of a different kind to employer's business, is unreasonable, and therefore void: *Perls* v. *Saalfeld* ([1892] 2 Ch. 149); *Baker* v. *Hedgecock* (39 Ch. D. 520).

(3) A contract restraining a bagman from calling on, soliciting orders from, or dealing with plaintiff's old customers (in the way of plaintiff's business) is valid: *Mills* v. *Dunham* ([1891] 1 Ch. 576). In this case the words in brackets were implied. Contrast *Davies* v. *D.* (36 Ch. D. 359).

(4) A contract prohibiting a former clerk from working in or starting the same business for a year after dismissal in the United Kingdom, France, or Canada is valid, at least as to the United Kingdom, the contract being severable: *Underwood* v. *Barker* ([1899] 1 Ch. 300).

(5) In *Baines* v. *Geary* (35 Ch. D. 154) under an agreement for employment as a milk-carrier the servant undertook that "he would not either during service or after being discharged or quitting such service serve (with milk, etc.) or directly or indirectly interfere with any of the customers served or belonging at any time to the master, his successor, or assigns." It was held, as in the *Nordenfelt* case, that the undertaking was severable, and could be enforced in respect of persons who were customers during the employment. In *Dubowski* v. *Goldstein* ([1896] 1 Q. B. 478) similar words were used, the words in brackets being implied, and an injunction was granted similar to that in *Baines* v. *Geary*. The C. A. intimated their opinion that the entire covenant was good.

(6) In *Rogers* v. *Maddocks* ([1892]) 3 Ch. 346) a covenant by a brewer's traveller not to sell beer nor aerated waters in a certain area was severed: as to beer it was upheld, as to aerated waters it was void. In *Evans* v. *Ware* ([1892] 3 Ch. 502) the Court upheld a contract of this nature entered into by an infant milkman and acted on by him after attaining twenty-one.

(7) Unlimited duration of time is no objection to an otherwise reasonable covenant of this kind: *Haynes* v. *Doman* ([1899] 2 Ch. 13).

(8) Reasonableness is a question on which evidence is inadmissible (*ib.*).

(9) Sales by V. to P. on condition to resell on stated conditions; and if to traders subject to a condition to resell on similar conditions are not in restraint of trade: *Elliman* v. *Carrington* ([1901] 2 Ch. 275).

(10) The mutual contracts which hold a Trade Union or combine

together are in restraint of trade, and therefore unenforceable: *Chamberlain's Wharf* v. *Smith* ([1900] 2 Ch. 605).

(11) A covenant "to retire, so far as the law allows, from the business" is bad for vagueness: *Davies* v. *D.* (36 Ch. D. 359).

(12) A covenant by a retiring partner "not to trade so as to affect the continuing partners" is (assuming it to be valid) personal, and will not pass to the assigns of the continuing partners: *Davies* v. *D.* (*ubi supra*). But see *Batho* v. *Tunks* ([1892] W. N. 101), and cases on goodwill.

And see generally Smith's Leading Cases, *Mitchel* v. *Reynolds*, 10th ed., vol. i. pp. 391 *et seq.*

Restrictive Covenants.

AUSTERBERRY *v.* CORPORATION OF OLDHAM.

(29 Ch. D. 750.)

Principle.

The doctrine of Tulk *v.* Moxhay *is confined to restrictive covenants, and will not be extended to a covenant to lay out money or do any other act so as to bind a purchaser taking with notice of the covenant.*

Summary of facts.

Elliott conveyed a slip of land, bounded on both sides by other lands which belonged to him, to the trustees of a road company, who covenanted with Elliott, his heirs and assigns, that they, their heirs and assigns, would make and maintain the road, and allow the user by the public subject to tolls. Elliott sold his lands to Austerberry and the trustees sold the road to the Corporation of Oldham, both parties having notice of the covenant. The C. A. decided that Austerberry could not enforce the covenant against the Corporation.

Erasement or contract?

Jessel, M.R., raised the question in the *L. and S. W. Railway Co.* v. *Gomm* (20 Ch. D. 562, 583)*, whether covenants not to use one's land in a certain way—and which are attached to the land—ought not to be regarded as easements instead of as covenants.

It is more logical, and more in accordance with continental usage, to regard "restrictive covenants" as a branch of the law of "negative easements." "Negative easements" may be illustrated by rights to light which prevent the owner of the servient tenement from building so as to obstruct light. But this branch was invented by equity; hence arose two peculiarities:—

Being invented by equity they were called covenants;

(1) The first peculiarity is a peculiarity of name. "Restrictive covenants" could not be called easements because, before 1875 (Nov.), common law would not recognize their existence (unless they were entered into between landlord and tenant, or unless they were purely personal covenants), so they had to be termed covenants, on the analogy of those covenants running with the land which bind lessees and reversioners and their respective assignees. (See Smith's L.C., 10th ed., vol. i. p. 52, *Spencer's* case.) The word "covenant" is especially misleading: "if there were a mere agreement and no covenant this Court would enforce it:" per Lord Cottenham, *Tulk* v. *Moxhay* (*ubi infra*); and Hall, V.C., said in *Renals* v. *Cowlishaw* (*ubi infra*), "This right exists wherever a mutual contract can be sufficiently established."

but they differ from covenants,

and they differ from contracts in procedure,

And the word "contract" is misleading, for (1) the Court will grant an injunction without any necessity to show damage, *Lord Manners* v. *Johnson* (1 Ch. D. 673)†; *Richards* v. *Revitt* (7 Ch. D. 224); (2) the parties bound are different: covenantee can sue covenantor's assign's tenant, *Wilson* v. *Hart* (1 Ch. 463); or the occupier, *Mander* v. *Falcke* ([1891] 2 Ch. 554); or lessee, *Taite* v. *Gosling* (11 Ch. D. 273); *John Brothers* v. *Holmes* ([1900] 1 Ch. 188); and *vice versâ*, *Spicer* v. *Martin* (44 A. C. 12); *Taite* v. *Gosling*; and no contractual right in cases coming within Spencer's case enables him to do this, *Bryant* v. *Hancock* ([1898] 1 Q. B. 716; [1899] A. C. 442); if covenantee is assign only of a mortgagor he can sue, *Rogers* v. *Hosegood* ([1900] 2 Ch. 388), and benefits and burdens pass to equitable assigns and not merely to legal assigns as in cases coming within Spencer's case, *ante*, p. 346; (3) no purely personal remedy like an *assumpsit* has ever been applied in cases of this kind; and (4), as we shall see, the right to sue can be lost more easily than the right to sue for breach of contract.

exemption from rule against perpetuity,

Owing to their nomenclature restrictive covenants were regarded as an exception to the rule against perpetuities (see *ante*, pp. 45, 108). If they had been called easements, they would not have been regarded as exceptions, for easements are rights of property, and the most important rights of property are in their nature perpetual; indeed, it was in order to defend the perpetuity of these rights of property that the rule against perpetual contracts or conditions was invented.

and in exclusion of positive covenants.

Being, then, called contracts, and, as such, exceptions to the rule against perpetuities, it was suggested that exceptions to this rule might be created by any contract made since the *Judicature Acts*. If you violate the rule by a contract not to do this or that, why not violate it by a contract to do this or that? The language used with regard to covenants running with the soil is equally applicable to negative and positive covenants; and *Spencer's* case and similar cases put negative and positive covenants in the same category. When Lord Cottenham laid down the principle in *Tulk* v. *Moxhay* (2 Phill. 774)*—the Leicester Square case of 1848, which has been characterized as the first case in which this doctrine was "brought to a focus"—he drew no line between "a covenant between vendor and purchaser on the sale of land that the purchaser and his assigns shall (1) use or (2) abstain from using the land in a particular way."

The fallacy of this line of reasoning was pointed out in three cases—*Haywood* v. *Brunswick P. B. B. Society* (8 Q. B. D. 403); *The London and S. W. R. Co.* v. *Gomm* (20 Ch. D. 562)* (followed *e.g.* in *Ray* v. *Walker* ([1892] 2 Q. B. 88)); and the l.c.

The first case was a case of a covenant to repair, the second case contained a covenant to reconvey on the exercise of an option by the vendor, and the principle of *Tulk* v. *Moxhay* was regarded as only applicable to "such a covenant as can be complied with without an expenditure of money" (8 Q. B. D. 410), not to a covenant "compelling a man to lay out money or do any other act of an active character" (20 Ch. D. 583). In the third case the apparently inconsistent case of *Morland* v. *Cook* (6 Eq. 252) was explained as the grant of a rent-charge to carry out a common law liability to repair. The effect of these three decisions has been to settle the law once for all; but see *Andrew* v. *Aitken* (22 Ch. D. 218). Restrictive covenants have once for all been relegated to a class by themselves, and have been taken out of the law of contract.

They differ from easements in the matter of notice.

(2) Restrictive covenants differ from easements. Easements have not got to be kept alive by "notice;" but "restrictive covenants" die for want of "notice" as soon as the legal estate changes hands; and once dead they cannot be resuscitated: *Renals* v. *Cowlishaw* (9 Ch. D. 125; 11 Ch. D. 866)*.

Evidence that a restrictive covenant is intended, express,

In order that the benefit of a covenant may enure to a purchaser of land from the covenantee it must be shown—

(1) Either that the conveyance containing the covenants expressly confers the benefit of the covenant on the owner for the time being of each portion retained by the vendor, or at any rate of that particular portion in respect of which plaintiff claims: per Hall, V.C., in *Renals* v. *Cowlishaw* (*ubi supra*). Thus V. sells *a.* to P^{i}. subject to a restrictive covenant for the benefit of V. or other the owners of *b.* or *c.*, and sells *b.* to P^{ii}., who does not know of the first sale. Here "the benefit has been once clearly annexed to one piece of land, and it passes by assignment of that land" to P^{ii}. "without proof of special bargain or representation on the assignment," *Rogers* v. *Hosegood* ([1900] 2 Ch. 388, 407), like "title deeds" *ib.* cited in *Muller v. Trafford* ([1901] 1 Ch. 61), and P^{ii}. can sue P^{i}., *ib.*, *Nalder* v. *Harman* (83 L. T. 257). Contrast *Keates* v. *Lyon* (4 Ch. 218) (no scheme): *Tucker* v. *Vowles* ([1893] 1 Ch. 195) (too vague): *In re Fawcett & Holmes* (42 Ch. D. 150) (personal contract).

(2) Or that the purchaser is "an assign of all that the vendor retained when he executed the conveyance containing the covenants:" *Renals* v. *Cowlishaw.*

implied from simultaneous sales,

(3) Where the whole estate is offered for sale simultaneously and the vendor retains no land, "that is almost if not quite conclusive (unless there is something contradictory) that the covenants which he takes from the purchasers are intended for the benefit of each purchaser as against the others:" *Nottingham Patent Brick, etc., Co.* v. *Butler* (16 Q. B. D. 778, 785).

The reason for this was thus stated in the same case (15 Q. B. D. 268) by Wills, J., and approved by Lord Esher and Lindley, L.J. (S. C. 16 Q. B. D. 778, 784, 791): "Where the same vendor selling to several persons plots of land, parts of a larger property, exacts from each of them covenants imposing restrictions on the use of the plots sold without putting himself under any corresponding obligation, it is a question of fact whether the restrictions are merely matters of agreement between the vendor himself and his vendees imposed for his own benefit and protection, or are meant by him and understood by the buyers to be for the common advantage of the several purchasers;" and only in the latter case "such purchasers and their assigns may enforce them *inter se* for their own benefit;" and he added, "Where the vendor retains no land, how can he be construed as imposing covenants for his own benefit?"

Stirling, J., drew the same inference in a case where the only portion of land retained by the vendor for his own benefit already complied with the conditions; and it was shown upon a plan annexed to the particulars that this was the case: *In re Birmingham and District Land Co. and Allday* ([1893] 1 Ch. 342). Compare *Mackenzie* v. *Childers* (43 Ch. D. 265) (plan and declared *intention* to insert such covenants); contrast *Everett* v. *Remington* ([1892] 3 Ch. 148) (not to build without consent of V. heir and assigns).

or intended sales;

(4) Where the vendor intends to retain no land (as when he puts up an entire estate to auction and some lots are unsold) the same inference is drawn as in (3), only the vendor stands in the shoes of the persons who would have been purchasers of the unsold lots, if such lots had been sold. (The usual way in which this rule is stated is that the vendor, after the first sales, is subject to an implied contract not to deal with or sell the property without subjecting it to these conditions.) The four last-cited cases illustrate this principle. In *Mackenzie* v. *Childers* an injunction was granted at the instance of a purchaser of lots sold at the first auction against his vendor reselling unsold lots free from the restrictive covenants subject to which the whole estate was originally offered for sale.

In *Collins* v. *Castle* (36 Ch. D. 243) property *a.*, *b.*, *c.* was put up for sale, and *a.* was sold to plaintiffs. There was a general scheme, whose details, however, varied with regard to different plots, some plots being free from restrictive covenants. Next year *b.*, *c.*, *d.* was put up for sale, and *b.* was sold to plaintiffs; *c.* was made subject to similar restrictive covenants. Next year *c.* was sold to defendant subject to the restrictive conditions mentioned in the two previous years. Plaintiff obtained an injunction against any violation by defendant of these conditions. It is obvious that this case only carried the principle of the *Nottingham* case (as Kekewich, J., called it) a little further. Kekewich, J., did not base his decision on any contractual right in the plaintiffs. "They are entitled," he said, "not to sue the defendant on the covenant contained in his purchase deed, but to enforce that covenant so far as it is in accordance with the conditions subject to which he bought" (p. 255). Contrast *Davis* v. *Corp. of Leicester* ([1894] 2 Ch. 208) (*ultra vires*).

from sub-sales,

(5) If P^{i}. purchaser of a lot subject to a restrictive condition, resells a part thereof to P^{ii}., with notice of the covenant, can P^{i}. enforce it against P^{ii}.? (*a*) No; although both knew of it: *King* v. *Dickeson* (40 Ch. D. 596), where P^{ii}. was mortgagee and did not rely on it. See, too, *Everett* v. *Remington*, *supra*. (*b*) Yes; where P^{ii}. was lessee and P^{i}. "represented" the existence of this burden to P^{ii}., and P^{ii}. relied on this representation: *Spicer* v. *Martin* (14 A. C. 12). Lord Macnaghten based this equity on the maxim that a man may not derogate from his grant, *ib.*, p. 25. Contrast *Master* v. *Hansard* (4 Ch. D. 718). See *post*, p. 360 (5).

and other cases.

(6) If V. sells (lets) *a.* to P^{i}., covenanting not to sell (let) *b.* for the same purpose, and then sells *b.* to P^{ii}. subject to a covenant not to let the premises be used for the same purpose as *a.*, can P^{i}. sue P^{ii}. or his assigns if the premises are so used? No; because P^{i}. would be getting a benefit greater than that for which he bargained: *Kemp* v. *Bird* (5 Ch. D. 974); *Ashby* v. *Wilson* ([1900] 1 Ch. 66). It is a mere question of construction whether the negative easement has been violated, and a contrary construction was inadvertently adopted in *Fitz* v. *Iles* (62 L. J. 238; [1893] 1 Ch. 77); *Tyndall* v. *Castle* ([1893] W. N. 40).

(7) Sale or lease subject to a general scheme for user of the land need not be by auction: *Renals* v. *Cowlishaw*, *Everett* v. *Remington*, *Spicer* v. *Martin*, *Rogers* v. *Hosegood*, *supra*, and landlord-and-tenant cases, *infra*. In *Nalder* v. *Harmen*, *supra*, it was first by private treaty, and last by auction.

Release of land.

The land is released from its burden (1) when a purchaser buys without notice the legal estate to which either the burden or (*Renals* v. *Cowlishaw*) benefit is attached. It must be remembered, however, that lessees have notice of their lessor's title. See *Wilson* v. *Hart* (1 Ch. 463) (*post*, p. 362).

(2) If the covenantees have committed or acquiesced in material breaches of the restrictive covenant: *Duke of Bedford* v. *Trustees of the British Museum* (2 My. & K. 552); *Peek* v. *Matthews* (3 Eq. 515); *Sayers* v. *Collyer* (28 Ch. D. 103); *Hepworth* v. *Pickles* ([1900] 1 Ch. 108); *secus* where such breaches are immaterial or do not affect a covenantee directly, *Western* v. *Macdermott* (2 Ch. 72), *Richards* v. *Revitt* (7 Ch. D. 224), *German* v. *Chapman* (7 Ch. D. 271), *Meredith*

v. *Wilson* (69 L. T. 336), *Knight* v. *Simmonds* ([1896] 2 Ch. 294)†; *secus* where he merely remained passive, *L. C. and D. Ry. Co.* v. *Bull* (47 L. T. 413).

(3) If the neighbourhood has changed, and it cannot be enforced: *Duke of Bedford* v. *Trustees, etc., supra.*

(4) By a purchase under the *Lands Clauses Act*, 1845, etc.: *Kirby* v. *School Board for Harrogate* ([1896] 1 Ch. 437); for the remedy under the *L. C. Act* (if any) is specified by sect. 68. or

(5) It can be released as against one covenant~~ee~~ without being released as against others: *Jackson* v. *Winnifrith* (47 L. T. 243), *King* v. *Dickeson* (40 Ch. D. 596). Compare *Knight* v. *Simmonds* (*ubi supra*), where there was a general scheme affecting the property (*a., b., c., d.*); and sub-purchasers of *a., b.* substituted a qualified scheme. The qualified scheme was alone enforceable as between different occupiers of *a., b.*, although as between any occupier of *a., b.*, and any occupier of *c.* or *d.*, the general scheme was binding.

Construction.

A restrictive covenant to confine an estate to shops will not be implied from a covenant to build shops: *Holford* v. *Acton U. D. C.* ([1898] 2 Ch. 240).

What cannot be restrictive covenants.

The expression "run with the land" applies to covenants within *Spencer's case*, not to covenants within *Tulk* v. *Moxhay*; thus the covenants cited in (6), *supra*, could not "run with the land" within the meaning of *Spencer's case*: *Thomas* v. *Hayward* (L. R. 4 Ex. 311).

Cases common to *Spencer's case*, and *Tulk* v. *Moxhay.*

Landlord and tenant cases often fall under the head of *Spencer's case* and *Tulk* v. *Moxhay*, and the rules in these two classes of cases coincide and overlap. *Hudson* v. *Cripps* ([1896] 1 Ch. 265) extended the rule in *Tulk* v. *Moxhay* from plots to flats. A prominent sub-class of cases, now irrevocably included in this neutral territory, are tied public-house cases: *Luker* v. *Dennis* (7 Ch. D. 227); *Clegg* v. *Hands* (44 Ch. D. 503); *White* v. *Southend Hotel Co.* ([1897] 1 Ch. 767); *John Brothers* v. *Holmes* ([1900] 1 Ch. 188). These cases contradict *Keppell* v. *Bailey* (2 My. & K. 517). Besides, it is hard to see why the tying covenant is, and the covenant not to forfeit the license is not, *Bryant* v. *Hancock*, *supra*, within *Tulk* v. *Moxhay*; and a public-house might, on a sale, be tied to all eternity. Once extend the doctrine beyond the limits of urban servitudes, its limits become obscure, and its justice doubtful.

Practice.

In *Bowes* v. *Law* (9 Eq. 636) damages were granted against an equitable purchaser in lieu of injunction. Compare *dictum* in *Sayers* v. *Collyer* (28 Ch. D. 110).

An open question.

It would appear from the above cases that there is only one contingency which is not provided for, and that is supposing the common vendor sells under one scheme at successive auctions, and has at a subsequent sale actually parted with land free from restrictive covenants to a purchaser for value without notice. It is clear that there is no remedy against the purchaser. It is clear also that an injunction will not lie, and it is doubtful whether an action for damages will lie against the vendor: *Clements* v. *Welles* (1 Eq. 200); *Patman* v.

Harland (17 Ch. D. 353); *Fitz* v. *Iles* (2 R. 132, correcting [1893] 1 Ch. 77); *Hall* v. *Ewen*, and *Bowes* v. *Law* (*ubi supra*), prove that when a vendor has parted with his land even to a lessee he has parted with his liability.

No remedy in contract at common law has ever been applied in cases of this kind, and it would be obnoxious to the same objections—namely, that it is void because there is no time limit—now as it was before the *Judicature Act*. The *Judicature Act* has not applied the rules prevalent in one sort of action to another sort of action. The better view seems to be to regard these restrictive covenants as having nothing to do with the law of contract, but as being a burden upon land.

See Smith's Leading Cases, 10th ed., vol. i. pp. 86 *et seq.*

Notice.

PATMAN *v.* HARLAND.

(17 Ch. D. 353.)

Principle.

Where a purchaser has notice of a deed forming part of a chain of title, he has notice of the contents of the deed.

A lessee has notice of his lessor's title.

Summary of facts.

Patman conveyed to Hervè two freehold plots of land, part of a building estate, subject to restrictive covenants, one of which was that private dwelling-houses only should be erected. Hervè subsequently conveyed the two plots, subject to the covenants, to Harland. Harland, who had erected a dwelling-house on one plot, granted a lease of the plot to B., and the lease provided that B. might erect a studio and use the premises as a school of art, but not for carrying on any other business or employment. Neither B. nor her solicitor knew of the restrictive covenants, and B. had proceeded to erect and nearly completed a studio detached from the house. The Court declared that B. was bound by the restrictive covenant, and restrained her from proceeding with the construction of the studio.

Arguments in the l.c.

In this case, the defendant, though ignorant of the restrictive covenant which affected the property, was bound by it on the principle established, as Jessel, M.R., said, for more than a century, and treated by Lord Eldon as settled law, that a lessee is bound to make reasonable inquiry into his lessor's title, to require "the usual title, whatever that title may be. If the lessor had a conveyance made to him the day before that would not do; the lessee must ask for the conveyance to him and a fair reasonable deduction of title."

Vendor and Purchaser Act, 1874, s. 2.

It had been contended that the effect of the *Vendor and Purchaser Act*, 1874, s. 2, and *C. A.*, 1881, ss. 3 (1) and 13, preventing an intended lessee or assignee from calling for the lessor's title, was to alter this rule. This point was disposed of in the judgment as follows:—"What the *V. and P. Act* does is this, in order that a lessee may obtain his lessor's title, it makes an express stipulation to that effect necessary, whereas formerly the rule was the other way, that without express stipulation the lessee had a right to the title. If, therefore, the lessee had formerly expressly bargained to take a lease without looking into the lessor's title, the lessee would have been bound by constructive notice, and now, if the lessee says nothing, it is exactly the same as if formerly he had bargained expressly not to look into the lessor's title" (p. 359). See *Mogridge* v. *Clapp* ([1892] 3 Ch. 382), *ante*, p. 138; *Imray* v. *Oakshette* ([1897] 2 Q. B. 218); *Ebbetts* v. *Conquest* ([1895] 2 Ch. 377; [1896] A. C. 490). In this last case an underlessee was under liability to repair. "He had clear notice upon the face of his own underlease that it was an underlease, and that there was a subsisting lease from the superior landlords; and knowing . . . that he must be taken to have known all the terms of that superior lease:" per Rigby, L.J. (p. 387). One of these terms was that the superior ended ten days after the inferior lease; and another term entailed far greater liabilities to repair than those which the underlease imposed. The effect of constructive notice of these terms in the superior lease upon the underlessee was that the measure of damages for breach of his covenant, was the liability in which such breach involved his lessor under the terms of the superior lease. And see *Hyde* v. *Warden* (3 Ex. D. 72) (agreements for leases); *Wilson* v. *Hart,* cited *supra,* p. 356.

There is one other method besides express stipulation whereby a lessee may obtain inspection of his lessor's title; and that is if he has definite knowledge *aliunde* of its defect, pleads it in an action, and obtains an order for discovery and production under Order XXXI., r. 12 *et seq.*: *Jones* v. *Watts* (43 Ch. D. 574).

Notice of a deed is

As then B. had in the l.c. constructive notice of the lessor's title-deeds, she had similar notice of their contents. As Jessel, M.R., said, "Notice of a deed relating to and forming part of the chain of title is notice of the contents of that deed, and it is no excuse for not asking to look at it to say you were told" that it did not affect the title. "If it does affect the title you are bound by its contents."

notice of its contents.

There is, however, an important exception to this rule as stated; which is, that if a purchaser agrees at a sale, either by auction or private contract, to take a sublease or to purchase leaseholds, he is not supposed to be acquainted with the contents of the lease before signing the contract, unless he has either inspected it beforehand or there is a condition of sale that he should do so. "There is great practical convenience in requiring the vendor who knows his own title to disclose all that is necessary to protect himself, rather than in requiring the purchaser to demand an inspection of the vendor's title-deed before entering into a contract a demand . . . which is not in accordance with the usual course of business:" per Fry, L.J., *Reeve* v. *Berridge* (20 Q. B. D. 523); *In re White and Smith's C.* ([1896] 1 Ch. 637), *ante*, p. 332 (1). And compare *Caballero* v. *Henty*, cited below. But this exception had nothing to do with the l.c., where the title had been investigated in due course.

Representation of lessor no answer.

It was, however, contended that there was a representation that no such restrictive covenant existed. A recital has been construed as a representation, *Hope* v. *Liddell* (21 B. 183), why should not this proviso coupled with the lessor's silence be similarly construed? The rule was stated thus in *Williams* v. *W.* (17 Ch. D. 443):—"If a man has notice that there is a deed or document, and at the same time has notice that that deed or document is entirely worthless or does not affect the property with which he is going to deal, he is put so completely off his guard that a Court of Equity does not treat him as fixed with knowledge of the document or the effect of it."

The following are instances of the rule:—Representations avail (*a*) where a purchaser is told of a deed that may or may not, and is told that it does not, affect the land. He has a complete title without the deed: *Jones* v. *Smith* (1 Ph. 244); *In re Bright's T.* (21 B. 430); *Carter* v. *Williams* (9 Eq. 678), as cited in the l.c. (p. 358); (*b*) a mortgagee of a company has notice that there are debentures; but the debentures may or may not affect his right to priority, and he is assured that they do not: *English and Scottish Mercantile Investment Co.* v. *Brunton* ([1892] 2 Q. B. 700). Analogous cases of a man asking for absent title-deeds and being put off with a plausible excuse have been discussed, *ante*, pp. 251 *et seq.* (*c*) If a share-certificate contains a representation that it is fully paid up, the purchaser who takes it in the ordinary course of business need not inquire whether it has been fully paid up, and the *onus* lies on the company to prove that the purchaser had constructive notice that it was not paid up: *Burkinshaw* v. *Nicolls* (3 App. Cas. 1004), followed in *In re A. W. Hall & Co.* (37 Ch. D. 712); *In re New Chile Gold Mining Co.* ([1892] W. N. 193); *McKay's Case* ([1896] 2 Ch. 757). (*d*) An original allottee is similarly protected, *Bloomenthal* v. *Ford* ([1897] A. C. 156);

Parbury's Case ([1896] 1 Ch. 100), but not unless he can show that he in fact relied on the representation: *Markham & Darter's Case* ([1899] 1 Ch. 414; 2 Ch. 480). (*e*) Again, debentures and scrip were regarded as negotiable because of a representation to that effect adopted by each holder, *Goodwin* v. *Robarts* (1 A. C. 476), but these cases probably rest on an entirely different basis, namely, law merchant: *Bechuanaland, etc., Co.* v. *London, etc., Bank* ([1898] 2 Q. B. 658).

In the l.c. the Court pointed out that reliance on representation had only been of avail where a person might get a complete chain of title without any notice of the deed or proviso, about which the representation was made; and that it was therefore out of place here, as it was in *Hope* v. *Liddell.*

"Actual" or "constructive" notice.

Notice according to the time-honoured division is either "actual" or "constructive" notice, which means "evidence of notice, the presumption which is so violent, that the Court will not even allow of its being controverted:" *Plumb* v. *Fluitt* (2 Anst. 438); *Espin* v. *Pemberton* (3 D. & J. 547).

Conveyancing Act, 1882, s. 3, defines constructive notice.

Sect. 3 of the *C. Act*, 1882, defines constructive notice thus:

"(1) A purchaser shall not be prejudicially affected by notice of any interest, fact, or thing, unless:—

"(i.) It is within his own knowledge, or would have come to his knowledge, if such inquiries and inspections had been made as ought reasonably to have been made by him;" about which Lindley, L.J., said it "really does no more than state the law as it was before, but its negative form shows that a restriction rather than an extension of the doctrine of notice was intended:" *Bailey* v. *Barnes* ([1894] 1 Ch. 25, 35)*.

Lord Cranworth's definition, and L.J. Lindley's three classes.

Lord Cranworth, in *Ware* v. *Lord Egmont* (4 D. M. & G. 460, 473), said that constructive notice arose where a purchaser would have acquired knowledge of a defect but for his "gross or culpable negligence," a phrase which has been frequently cited. See *In re A. W. Hall & Co.* (*supra*), *Bailey* v. *Barnes* ([1894] 1 Ch. 31); and compare *Montefiore* v. *Browne* (7 H. L. C. 241). Indeed, all the cases of "gross carelessness" mentioned, p. 251, fall under this head: see *Oliver* v. *Hinton* ([1899] 2 Ch. 264), per Romer, J.; and *Dovey* v. *Corey*, cited below, was referred to this principle of gross carelessness ([1899] 2 Ch. pp. 671 *et. seq*.). In estimating the negligence, regard must be had to the "usual course of business:" per Lindley, L.J., in *Bailey* v. *Barnes*, p. 35. And the cases, according to Lindley, L.J., fell into two classes: I. First, where "a purchaser has actual notice of some defect, inquiry into which would disclose others." II. Secondly, where "a purchaser has purposely abstained from making inquiries for fear he should discover something wrong" (*ib*). III. Knowledge by agents, or "imputed notice," as Lord Chelmsford called it in *Espin* v. *Pemberton* (3 De G. & J. 547), is sometimes classed under constructive notice, but it really forms a class by itself.

I. Visible defects.

I. When a person purchases property where a visible state of things exists, such as a sea-wall, which could not legally exist, or is unlikely to exist, without the property being subject to some burden, he is taken to have notice of the extent and nature of that burden: *Morland* v. *Cook* (6 Eq. 252). Similarly an archway coupled with plans, *Davies* v. *Sear* (7 Eq. 427), may effect notice of a right of way. In *Allen* v. *Seckham* (11 Ch. D. 790) (compare *Greenhalgh* v. *Brindley* ([1901] 2 Ch. 324) a window overlooking the purchased property, and in *A.-G.* v. *Biphosphated Guano Co.* (11 Ch. D. 327) a road marked private on the plan, was not enough to put the purchaser on inquiry as to whether an easement existed. In *Hervey* v. *Smith* (22 Beav. 299) the number of chimneys differed from the number of flues, and thus gave notice of a smoke easement. And a law suit advertises a solicitor's lien (*ante*, p. 227), and absent title-deeds a mortgage (*ante*, pp. 250 *et seq.*).

Possession by strangers, etc., or by tenant.

In *Cavender* v. *Bulteel* (9 Ch. 79) possession of property for partnership purposes gave notice that one partner could not mortgage one half of the premises. In *Caballero* v. *Henty* (9 Ch. 447) an action was brought by the vendor for specific performance of a contract to purchase a freehold public-house. The conditions of sale stated that it was in the occupation of a tenant; but it was in fact in lease for a term of which eight years were unexpired. The object of the purchasers was to obtain a public-house for the purpose of extending their own business as brewers. The C. A., practically overruling *James* v. *Lichfield* (9 Eq. 51), refused specific performance (compare *Phillips* v. *Miller* (L. R. 10 C. P. 420, 427); *In re Davis & Cavey* (40 Ch. D. 601)), because the doctrine of *Daniels* v. *Davison* (16 Ves. 249, 17 Ves. 433); *Holmes* v. *Powell* (8 D. M. & G. 572); *Trinidad Asphalte Co.* v. *Coryat* ([1896] A. C. 587), that a purchaser who has notice that parties are in possession is bound to inquire what their tenancies are, has no application to cases where the matter still rests in contract. Possession by a tenant from year to year paying rent to an estate agent does not give P. notice that the agent is agent in that matter not for V. but for a stranger: *Hunt* v. *Luck* ([1901] 1 Ch. 45)†.

Outstanding estate.

This doctrine is merely an extension of the old doctrine that notice of an outstanding legal estate is notice of its trusts, and that notice of a relevant equity is notice of its extent and scope: *A.-G.* v. *Flint* (4 Ha. 147); *Neesom* v. *Clarkson* (2 Ha. 163), cited in *Parkinson* v. *Hanbury* (L. R. 2 H. L. 1, 17); *Graham* v. *Drummond* ([1896] 1 Ch. 968). *Graham* v. *Drummond* established that it is safe to buy from an executor who is also residuary legatee.

Recitals, etc.

In *Neesom* v. *Clarkson* a recital applying wrong law to the right facts gave notice of the flaw to P. A recital of a conveyance by T. to V., (*a*) of V. having become entitled thereto, *In re Harman, etc., Ry. Co.* (24 Ch. D. 720), does not, (*b*) of V. having been appointed trustee, *In re Blairberg and Abrahams* ([1899] 2 Ch. 340), does give notice to P., on purchasing from V., of a settlement. See *ante*, p. 253. In *London, etc., Loan Agency* v. *Duggan* ([1893] A. C. 506) the signature "manager in trust" did not give notice of the trust. See *ante*, p. 193. Compare *In re Alms Corn Charity* ([1901] 2 Ch. 750).

Company's books.

A director has not got constructive notice of entries in the books of the company: *Hallmark's Case* (9 Ch. D. 332); *In re Denham* (25 Ch. D. 766), *Ex p. Lord Inchiquin* ([1891] 3 Ch. 28); *Dovey* v. *Corey* ([1801] A. C. 477, 492; S. C. 1899, 2 Ch. 673, 674). Documents having currency under law merchant do not give notice of the contents of other documents, except within the limits prescribed by law merchant: *Manchester T.* v. *Furness* ([1895] 2 Q. B. 539, 544).

Power of sale in mortgage.

A mortgagee sells under his power of sale one month after the date for redemption, and seven months after the date of the deed. Three months' notice were necessary. There was the usual clause protecting purchasers from inquiring into the circumstances under which the power was exercised. The purchaser is held to have notice that the sale was irregular: *Selwyn* v. *Garfit* (38 Ch. D. 273).

A mortgagee transfers his mortgage in fee to C. D. in consideration of £6316 5*s*. 8*d*. then due on his mortgage. Two days later C. D. purports to exercise his power of sale under the *C. A.*, and sells to E. F. in fee in consideration of £6316 5*s*. 8*d*. E. F., after mortgaging the premises for £6000, sells, subject to the mortgage, to P. for £2500. P. knows that the premises were valued at £8700 a month after the sale to E. F. The sale is invalid, yet P. has no constructive notice of invalidity in the sale: *Bailey* v. *Barnes* ([1894] 1 Ch. 25).

II. Wilful blindness.

II. A man may not clap a telescope to his blind eye and then say he did not see the danger-signal. Thus, "if a purchaser chooses to take property with a thirty-eight years' title, he has constructive notice of that which he would actually have known if he had required a forty-years' title," which means "a title deduced for forty years and for so much longer as it is necessary to go back in order to arrive at a point at which the title can properly commence:" per North, J., *In re Cox and Neve's C.* ([1891] 2 Ch. 109, 118). *À fortiori* if there is no inquiry into title: *Worthington* v. *Morgan* (16 Si. 547).

On the other hand, if he shuts his eyes, and there is a flaw; but had he opened his eyes the flaw would not have been discovered, he is safe: *Dunning* v. *Earl of Gainsborough* ([1885] W. N. 110).

Perhaps, too, if he buys a tiny allotment in the open market from a public body or the like, he need not investigate the title (?): *Kettlewell* v. *Watson* (21 Ch. D. 685, 707; 26 Ch. D. 501).

III. Knowledge of agents.

III. The knowledge of the agent does not affect his principal in the following cases:—

(*a*) Where "the act done by the agent is such as cannot be said to be done by him in his character of agent, but is done by him in the character of a party to an independent fraud on his principal:" per Fry, J., in *Cave* v. *C.* (15 Ch. D. 639, 644), citing *Kennedy* v. *Green* (3 M. & K. 699), etc.; *e.g.* if P.'s solicitor enters into a conspiracy of silence with V.: *Cave* v. *C.*, *Sharpe* v. *Foy* (4 Ch. 35), or hatches fraud for his own benefit "in this very transaction in order to defraud him:" *Rolland* v. *Hart* (6 Ch. 678, 683), unless the solicitor inveigles P. into signing his conveyance with a false recital in it which cloaks the fraud: *Dixon* v. *Winch* ([1900] 1 Ch. 736), or unless the concealment was not part of the fraud: *Boursot* v. *Savage* (2 Eq. 134). Compare *Atterbury* v. *Wallis* (8 D. M. & G. 454); *Thompson* v. *Cartwright* (33 B. 178); *ante*, pp. 204, 205.

(*b*) If the agent violates no duty but only serves his interest in concealing the flaw: *Bradley* v. *Riches* (9 Ch. D. 189); *Kettlewell* v. *Watson* (21 Ch. D. 685, 707).

(*c*) It is especially important to ask, where there is a common agent, was it within the agent's duty to give notice to P. of the flaw? and was it within his duty to receive notice from V. of the flaw? If not, P. has no notice: *In re Hampshire Land Co.* ([1896] 2 Ch. 743, 749)†, citing *In re Marseilles Ry. Co.* (7 Ch. 169), etc. (Company cases). See *ante*, p. 191.

(*d*) He is not bound unless in the words of the *C. A.*, 1882, s. 3 (1) (ii.):—"In the same transaction, with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent." This sub-section is a legislative reversal of *Hargraves* v. *Rothwell* (1 Keen, 160), *Boursot* v. *Savage*, *supra*, cited ([1901] 2 Ch. 259), etc.

Thus in *In re Cousins* (31 Ch. D. 671) Cousins, in 1875, mortgaged his share in certain trust property to Pepper, but the deed did not disclose any previous charge. In 1881, Pepper's executors gave notice of this mortgage to Cousins's trustees. Prior to 1875 Cousin's share had been mortgaged, and a solicitor named Banks had acted professionally for all parties in all these matters. The Court did not impute constructive notice of the prior charges to Pepper from the fact that Banks had acted as solicitor throughout, and as Pepper's executors had been the first to give notice, his charge was entitled to priority.

Chitty, J., in delivering judgment, said that in order that the knowledge of the solicitor may be imputed to the client, (1) "it must be in the same transaction; (2) the matter must come to his knowledge; and (3) must come to his knowledge as such, viz. as solicitor for the mortgagee."

In *Taylor* v. *London, etc., Banking Co.* ([1901] 2 Ch. 257–9) the mortgagee employed the mortgagor as his solicitor under similar circumstances with the same result.

Register cases.

"Actual notice . . . is required where it is sought to defeat the statutory priority acquired by registration" in patent, *New Ixion Tyre Co.* v. *Spilsbury* ([1898] 2 Ch. 484, 489), and Middlesex registry, *Bradley* v. *Riches*, *Rolland* v. *Hart*, *In re Weir* (58 L. T. 792), and annuity and rentcharge registration cases: *Greaves* v. *Tofield* (14 Ch. D. 563). In these cases constructive notice was held not to include actual notice to the agent. P. therefore need not inquire into V.'s title: *Lee* v. *Clutton* (46 L. J. Ch. 48). The Yorkshire Registries Act, 1884, s. 14, enacts that nothing short of fraud, "carrying with it grave moral blame," *Battison* v. *Hobson* ([1896] 2 Ch. 403, 412), shall defeat the priority enforced by registration. Where there is registration under the *Land Transfer Acts*, 1875–97, equitable mortgagees and the like who fail to register cautions and restrictions, will incur loss of priority either through negligence in failing to take this step, pp. 251 *et seq.*, or, possibly, the rule now applicable to Yorkshire applies here. Brickdale and Sheldon *Land Transfer Acts*, pp. 13, 14, 465–9.

Time the Essence of the Contract.

TILLEY *v.* THOMAS.

(L. R. 3 Ch. 61.)

Principle.

Time is not of the essence of a contract unless it is made so either by the express stipulations between the parties, the nature of the property, or the surrounding circumstances.

Summary of facts.

Thomas agreed to purchase a lease of a house from Tilley, "possession to be given" on a certain day. Tilley, who knew that Thomas required the house for immediate residence, tendered possession on the day named, which Thomas refused to accept, on the ground that Tilley had failed to show a good title. Tilley commenced a suit for specific performance, alleging that he had since deduced a good title. The C. A. dismissed the suit with costs.

Possession defined.

In the l.c. if P. (purchaser) had taken possession knowing that there was a blot on V.'s (vendor) title which could not be erased, he would have been regarded as having waived his objection: *In re Gloag and Miller's C.* (23 Ch. D. 320). If therefore P.'s refusal to enter into possession was a breach of contract, he was between the devil and the deep sea. Accordingly the C. A., following *Boehm* v. *Wood* (1 J. & W. 419), held that he was justified in refusing possession. "Possession" in these cases means possession under the contract, and such that V. must know that P. claims to be in possession under the contract: *Mills* v. *Haywood* (6 Ch. D. 196, 202); *ante*, p. 342.

Time is the essence in three cases.

Having disposed of this point, Lord Cairns continued as follows:— "A Court of Equity will indeed relieve against and enforce specific performance notwithstanding a failure to keep the dates assigned by the contract, either for completion or the steps towards completion, if it can do justice between the parties, and if, as Turner, L.J., said in *Roberts* v. *Berry* (3 D. M. & G. 284), there is nothing in the 'express stipulations between the parties, the nature of the property, or the surrounding circumstances' which would make it equitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract. Of the three grounds against interference mentioned by Turner, L.J., 'express stipulations' requires no comment. The 'nature of the property' is illustrated by the cases of reversions, mines, or trades. The 'surrounding circumstances' must depend on the facts of each particular case."

Judicature Act.

Sect. 25 of the *Judicature Act*, 1873, provides that stipulations in contracts as to the time or otherwise which would not before the commencement of this Act have been deemed to be or to have become of the essence of such contract in a Court of Equity, shall receive in all Courts the same construction and effect as they would have heretofore received in equity. See *Noble* v. *Edwardes* (5 Ch. D. 378).

Express stipulation.

Subject to waiver, and except in cases where forfeiture is threatened but penalty intended, *Ex p. Hulse* (8 Ch. 1022), or where vendor estops himself from claiming forfeiture, *Dodd* v. *Churton* ([1897] 1 Q. B. 562), stipulations that time is the essence of the contract, *Hudson* v. *Bartram* (3 Madd. 440), that the agreement shall be void or voidable, or that the buyer will not buy in case some term is not performed on a fixed day, *Williams* v. *Edwards* (2 Sim. 78); *Hipwell* v. *Knight* (1 Y. & C. Ex. 401); *Hudson* v. *Temple* (29 Beav. 536); *Parkin* v. *Thorold* (2 Sim. N.S. 1, 7), are construed literally.

Surrounding circumstances, and nature of the property.

The following are some of the principal cases in which, from the nature of the property or other circumstances, time has been considered of the essence of the contract:—A reversion, on the ground that it might become an estate in possession during the delay, and that its sale is general evidence of pressing want of money, *Newman* v. *Rogers* (4 Bro. C. C. 390); *Spurrier* v. *Hancock* (4 Ves. 667); unless controlled by the context, *Patrick* v. *Milner* (2 C. P. D. 342), or waived, *Hipwell* v. *Knight* (*supra*); a life annuity or a life estate, which may determine by the death of the *cestui que vie*, *Withy* v. *Cottle* (T. & R. 78); where the property was of a wasting character, as *e.g.* a leasehold for a short unexpired term, *Hudson* v. *Temple* (29 B. 536, 543); *Macbryde* v. *Weeks* (22 B. 533); or voidable unless certain buildings were completed by such and such a date, *Brewer* v. *Broadwood* (22 Ch. D. 109); where the property was of fluctuating value, *e.g.* foreign stock of varying value, *Doloret* v. *Rothschild* (1 S. & S. 590); coal, *Pollard* v. *Clayton* (1 K. & J. 462), or other mines, *Macbryde* v. *Weeks* (*supra*); where P. required the property in order to erect a cotton mill, *Wright* v. *Howard* (1 S. & S. 190), or for some other immediate purpose, as in *Gedye* v. *Duke of Montrose* (26 Beav. 45) and the l.c. (unless waived, *Webb* v. *Hughes* (10 Eq. 281)); or V. wanted the money to take out a patent, as in *Payne* v. *Banner* (15 L. J. Ch. 227); where V. was a fluctuating body (*e.g.* a dean and chapter), so that delay might give the purchase-money to persons other than those who signed the contract, *Carter* v. *Dean of Ely* (7 Sim. 211); or where delay might shift the burden from P. to V., as in a contract by a tenant to sell on Lady Day, *Coslake* v. *Till* (1 Russ. 376); in notices to shareholders of default in payment of calls, *Sparks* v. *Liverpool Waterworks* (13 Ves. 428); in an option to retire from a company, *Houldsworth* v. *Evans* (L. R. 3 H. L. 263); *Stewart's* case (1 Ch. 511); in covenants to renew a mining lease upon request, *London City* v. *Mitford* (14 V. 58); in options to purchase, *Dawson* v. *D.* (8 Si. 346); *Cookson* v. *C.* (8 Si. 529); *Brooke* v. *Garrod* (3 K. & J. 608); *Austen* v. *Tawney* (2 Ch. 143); *Dibbins* v. *D.* ([1896] 2 Ch. 348), and the like, *Darnley* v. *L. C. and D. Ry.* (1 D. J. & S. 204, L. R. 2 H. L. 43), unless waived, *Pegg* v. *Wisden* (16 B. 239).

Tendency of modern decisions, especially where trade is concerned,

"The tendency of modern decisions has been to hold persons concerned in contracts relating to land bound, as in other contracts, to regard time as material, and this principle has been applied with the greater strictness where the property was connected with the trade:" Dart's V. & P., 6th ed., vol. i. p. 484. It is obvious that many of the cases mentioned above, such as *Wright* v. *Howard*, *Payne* v. *Bonner*, came under this heading, as well as under the heading under which they have been arranged. We may add contracts for the sale of mines and works: *Parker* v. *Frith* (1 S. & S. 199, n.); and for the sale of a public-house as a going concern: *Weston* v. *Savage* (10 Ch. D. 736); *Day* v. *Luhke* (5 Eq. 336); *Cowles* v. *Gale* (7 Ch. 12); *Coslake* v. *Till* (*ubi supra*); *Tadcaster Brewery Co.* v. *Wilson* ([1897] 1 Ch. 705)†.

or mercantile law.

In *Reuter* v. *Sala* (4 C. P. D. 239) the C. A. regarded time as the essence of a contract for the purchase of pepper for a certain day. "It was argued that the rules of Courts of Equity are now to be regarded in all Courts, and that equity enforced contracts, though the time fixed therein for completion had passed. This was in cases of contracts such as purchases and sales of land, where, unless a contrary intention could be collected from the contract, the Court presumed that time was not an essential condition. To apply this to mercantile contracts would be dangerous and unreasonable:" per Cotton, L.J. (p. 249).

Notice.

Though time is not originally of the essence of the contract, it may be made so by notice. The law on this subject is thus stated by Lord St. Leonards in his Vendors and Purchasers, 14th ed. p. 268: "When time is not made of the essence of a contract by the contract itself, although a day for performing it is named, of course neither party can strictly make it so after the contract; but, if either party is guilty of delay, a distinct written notice by the other, that he shall consider the contract at an end if it be not completed within a reasonable time to be named, would be treated in equity as binding on the party to whom it is given." Where time is not originally of the essence of a contract for the sale of land, it will be made so by notice if there has been some default or unreasonable delay by the other party : *Parkin* v. *Thorold* (16 B. 59); *Green* v. *Sevin* (13 Ch. D. 589).

Reasonable time.

The notice must fix a reasonable time. In *Crawford* v. *Toogood* (13 Ch. D. 153), five weeks during the long vacation; in *McMurray* v. *Spicer* (5 Eq. 527), five weeks; in *Parkin* v. *Thorold* (16 B. 59), fourteen days; in *Green* v. *Sevin*, nineteen days, was unreasonable. In *Macbryde* v. *Weekes* (22 B. 533), a month; in *Compton* v. *Bagley* ([1892] 1 Ch. 313), fourteen days; in *Smith* v. *Batsford* (76 L. T. 179), ten days, was reasonable. In these three cases there were commercial reasons why the delay should be short.

Reasonable time must be given where delay is due to a defect of conveyance not of title, *Stewart* v. *Smith* (6 Ha. 222, n.); *Hatten* v. *Russell* (38 Ch. D. 334), *e.g.* that there are no S. L. A. trustees in a sale under the *S. L. Act;* but a short shrift—say a week—is enough where there is a defect of title: *Lee* v. *Soames* (59 L. T. 366).

Damages.

If the party makes default after notice given, damages for breach of contract are recoverable from him ; and if he be the vendor the deposit will be returned *plus* interest (*ante*, pp. 67, 68) and costs incurred by the purchaser in respect of the abortive sale, *e.g.* costs of investigating title: *Compton* v. *Bagley* (*ubi supra*). See *ante*, pp. 330 *et seq.*

No notice, and repudiation.

If no notice is given, the contract holds until the party making default repudiates it expressly or by conduct: *Cornwall* v. *Henson* ([1900] 2 Ch. 299). Repudiation by conduct of a term in a contract is not repudiation of a contract: *Mersey Steel Co.* v. *Naylor* (9 A. C. 434).

Injunction.

DAY *v.* BROWNRIGG.

(10 Ch. D. 294.)

GASKIN *v.* BALLS.

(13 Ch. D. 324.)

NORTH LONDON RAILWAY CO. *v.* GREAT NORTHERN RAILWAY CO.

(11 Q. B. D. 30.)

Principle.

The effect of sect. 25, *sub-sect.* 8, *of the Judicature Act,* 1873, *with regard to injunctions has not been to give any new rights to parties who had previously no rights enforceable at law or in equity, but simply to enable the High Court, without being hampered by its old rules, to grant an injunction whenever it is just or convenient so to do, for the purpose of protecting or asserting the legal rights of the parties.*

Summary of facts.

In the first case plaintiffs alleged that their house had been called "Ashford Lodge" for sixty years, and that defendant, whose adjoining house had been called "Ashford Villa" for forty years, had recently changed its name to "Ashford Lodge," and that this caused them expense, damage, and annoyance. The C. A. decided that there was no case for an injunction.

In the second case defendant purchased part of an estate which was subject to restrictive covenants against building beyond a certain line. Some buildings had been erected by his predecessor, but there had been acquiescence for five years, and defendant after his purchase erected further buildings beyond the line, and continued to build despite plaintiff's protest. Plaintiff then applied for a mandatory injunction to have all the buildings removed. The C. A. granted a mandatory injunction as to buildings erected after the time when the defendant had acquired his title, but refused to interfere with the other buildings.

In the third case the C. A. refused to issue an injunction to restrain a party from going on with an arbitration which might be futile, vexatious, and cause delay.

Principle of the three cases discussed.

These cases have been grouped together as settling the principles by which the Court is now governed as to the exercise of its jurisdiction with regard to injunctions. The 25th sect. of the *J. Act*, 1873 (subsect. 8), provides (*inter alia*) that an injunction may be granted by an interlocutory order of the Court in all cases in which it shall appear "to be just or convenient" that such order should be made; and any such order may be made either unconditionally or upon such terms as the Court shall think just. Having regard to the transfer of existing jurisdictions to the High Court of Justice under sect. 16 of the *J. Act*, 1873, and to the principle *omne majus continet in se minus*, this rule applies *à fortiori* to final injunctions: *Beddow* v. *B.* (9 Ch. D. 89, 93). In all three leading cases the Court was pressed by the argument that the effect of this section was to extend the principles upon which the Court proceeded in granting injunctions, and in all of them the Court declined to extend its jurisdiction beyond the point to which it had been carried before the *J. Act.*

No injunction against a mere inconvenience,

In the first case the Court said there was no authority for the proposition that a man had a legal right to the use of any name he chose to affix to any part of his landed property, whether consisting of a house or land, and that "this Court can only interfere where there is an invasion of a legal or equitable right." Similarly in *Street* v. *Union B. of Spain and England* (30 Ch. D. 156) the Court, following *Day* v. *Brownrigg*, declined to grant an injunction to restrain the use of a cypher telegraphic address—the case, in its opinion, being not one of legal injury, but simply of inconvenience. See *post*, (23).

nor against breaches of covenant acquiesced in,

In the second l.c. the Court considered that it would be going further than any decided case to enforce the covenant against the defendant in respect of acts done before he became owner, and without any complaint at the time. "In the matter of injunctions," Thesiger, L.J., said, the *J. Act* "has done nothing to alter the principles which have been laid down as to the exercise of its powers, where principles have been established as being just and convenient."

nor against persons

In the third l.c. the Court refused an injunction on the ground that the defendants were not inflicting on the plaintiffs that which the law acting without authority.

considers a wrong, and explained Jessel's (M.R.) *dicta* in *Beddow* v. *B.* to mean that "where there is either a legal or an equitable right which is being interfered with, or which the Court is called upon to protect, and the circumstances do not render it inconvenient or unadvisable to interfere, but render it convenient and advisable to interfere, the Court may protect that right by giving the remedy which previously would not have been given, namely, an injunction." Compare Davey, L.J.'s, judgment in *Harris* v. *Beauchamp* ([1894] 1 Q. B. 801, 809). "Those well-known words" ("just or convenient") "do not confer an arbitrary or unregulated discretion on the Court, and do not authorize the Court to invent new modes of enforcing judgments in substitution for the ordinary modes." The only novelty introduced was, according to Lord Esher, in *N. L. Ry. Co.* v. *Great N. Ry. Co.*, a novelty in the matter of procedure, not of jurisdiction (p. 36); the new procedure being due, according to Cotton, L.J., to the extension of the procedure of any one Court to the High Court, which "amalgamates in itself all the jurisdictions which had previously existed."

It was held in *London and Blackwall Ry. Co.* v. *Cross* (31 Ch. D. 354), following the l.c., *N. L. Ry. Co.* v. *G. N. Ry. Co.*, that the Court has no general jurisdiction to restrain persons from acting without authority, and accordingly an injunction to restrain a person from taking proceedings out of Court in the name of a person who had given no authority to use it, was refused. "The very first principle of injunction law," said Lindley, L.J., "is that *primâ facie* you do not obtain injunctions to restrain actionable wrongs, for which damages are the proper remedy." See *post*, (2).

Application for injunction.

An application for an injunction may be made by the plaintiff either *ex p.* or on notice. If by any other party (see *Carter* v. *Fey* ([1894] 2 Ch. 541)), then on notice to the plaintiff, and at any time after appearance by the party who makes the application (R. S. C., 1883, O. L. r. 6). It must relate to or arise out of the matter before the Court (*ib.*): *Collison* v. *Warren* ([1901] 1 Ch. 812). Reversioners may bring such action where there is damage to the reversion: *Mayfair Property Co.* v. *Johnston* ([1894] 1 Ch. 508)†; *Meux Brewery Co.* v. *City of London Electric Lighting Co.* ([1895] 1 Ch. 287, 317)†.

Breach of injunction.

In order to justify a committal for breach of an injunction the order need not be served if the respondent had notice of it *aliunde* and knew that the plaintiff intended to enforce it: *United Telephone Co.* v. *Dale* (25 Ch. D. 778). Notice may be given by telegram, but the Court will decide whether under the circumstances the party had in fact notice of the injunction: *In re Bryant* (4 Ch. D. 98); *Ex p. Langley* (13 Ch. D. 110); *Avory* v. *Andrews* (51 L. J. (Ch.) 414).

Interlocutory injunction.

The nature of an interlocutory injunction is illustrated by *Preston* v. *Luck* (27 Ch. D. 497), where, there being *primâ facie* a contract the C. A. thought it right to keep things *in statu quo* till the hearing. The Court is not deciding upon the rights of the parties, but must "be satisfied that there is a serious question to be tried," and "a probability that the plaintiffs are entitled to relief:" per Cotton, L.J. (p. 506).

Undertaking as to damages by applicant for interim injunction.

In cases where damage may be occasioned to the defendant, in the event of an interim injunction proving to have been wrongly granted, the Court will require the plaintiff to enter into an undertaking to abide by any order it may make as to damages; *secus* where the interim injunction is in its nature final: *Fenner* v. *Wilson* ([1893] 2 Ch. 656). The undertaking as to damages is not to be confined to damages sustained by the party against whom the injunction is granted: *Tucker* v. *New Brunswick Trading Co.* (44 Ch. D. 249).

Whenever the usual undertaking is given, and the plaintiff ultimately fails on the merits, the rule is to grant an inquiry as to damages, though the plaintiff was not guilty of any misrepresentation, suppression, or other default: *Griffith* v. *Blake* (27 Ch. D. 474, 477), commenting on *Smith* v. *Day* (21 Ch. D. 421). As to a married woman's undertaking, see *Hunt* v. *H.* (54 L. J. (Ch.) 289). The A.-G., as a rule, does not give an undertaking: *A.-G.* v. *Albany Hotel Co.* ([1896] 2 Ch. 696).

Undertaking in lieu of injunction.

Damages.

If an undertaking is offered in lieu of injunction, applicant for an injunction will continue his application at his own cost: *Jenkins* v. *Hope* ([1896] 1 Ch. 278). The measure of damages is discussed in *Mansell* v. *British Linen Co. Bank* ([1892] 3 Ch. 159).

Motion to discharge.

A motion to discharge an *ex p.* injunction obtained by misrepresentation is proper, though the injunction is about to expire: *Wimbledon Local Board* v. *Croydon R. S. A.* (32 Ch. D. 421), distinguishing *Bolton* v. *London School Board* (7 Ch. D. 766).

Mandatory injunction.

A jurisdiction which is exercised by the Court with caution is that of granting a mandatory injunction, the effect of which is not to order the performance of a positive act, but to direct that things should be restored to their former condition. When a defendant after receiving or evading notice of motion or writ of summons to restrain building endeavours to anticipate the order of the Court by hurrying on work, whatever he erects may be ordered to be pulled down at once without regard to the ultimate result of the action: *Gaskin* v. *Balls* (*supra*); *Daniel* v. *Ferguson* ([1891] 2 Ch. 27); *Lawrence* v. *Horton* (62 L. T. 749); *Von Joel* v. *Hornsey* ([1895] 2 Ch. 774). The order is at last affirmative in form as well as substance: *Jackson* v. *Normanby Brick Co.* ([1899] 1 Ch. 438).

Damages.

Damages are granted in lieu of injunction if plaintiff's rights are (1) small, (2) measurable, (3) compensateable in money, and (4) where an injunction would be oppressive: per A. L. Smith, L.J., *Shelfer* v. *City of London E. L. Co.* ([1895] 1 Ch. 322).

Plaintiff's conduct (*ib.*), p. 323, or the triviality of the offence, *Llandudno U. D. C.* v. *Woods* ([1899] 2 Ch. 705), may disentitle him even to damages.

Costs.

An action for an injunction carries costs as between solicitor and client if defended successfully by a public authority, but not costs of appeals: *Fielden* v. *Morley* (*Mayor*) ([1899] 1 Ch. 1; [1900] A. C. 133). See too *Smith* v. *Northleach R. D. C.* ([1901] W. N. 215).

Examples. The following examples illustrate the most original developments of the law of property, contract, and tort, which can be traced to the use of injunctions by the High Court since 1875.

Air. (1) Injunctions are granted to protect access of (*a*) air through apertures, *Aldin* v. *Latimer* ([1894] 2 Ch. 445, 446), (*b*) of air and light: *Chastey* v. *Ackland* ([1897] A. C. 155). See (16).

Arbitrators. (2) The Court has no general jurisdiction to restrain persons from acting without authority, and will not restrain a party from proceeding to arbitration in a matter beyond the agreement to refer, if such proceeding is merely futile and vexatious: *London and Blackwall Ry. Co.* v. *Cross* (31 Ch. D. 354); *Farrar* v. *Cooper* (44 Ch. D. 323): see *ante*, p. 374. An injunction may, however, be obtained against an arbitrator on the ground of corruption or obvious unfitness, *Malmesbury Ry. Co.* v. *Budd* (2 Ch. D. 113); *Beddow* v. *B.* (9 Ch. D. 89); *Pescod* v. *P.* (58 L. T. 76); but see *Jackson* v. *Barry Ry. Co.* ([1893] 1 Ch. 238, 246), and where the agreement to arbitrate is impeached, *Kitts* v. *Moore* ([1895] 1 Q. B. 253), or there is a preliminary question of malice: *Barnes* v. *Youngs* ([1898] 1 Ch. 414).

Clubs. (3) No injunction but only damages are given for expulsion from a proprietary club: *Baird* v. *Wells* (44 Ch. D. 661). For other clubs, see *ante*, pp. 163, 164.

Combines. (4) Combines. See (10).

Company. (5) A company in voluntary liquidation may be restrained from distributing its assets among its shareholders without providing for future liabilities under a lease: *Gooch* v. *London Banking Ass.* (32 Ch. D. 41); compare *In re Panther Lead Co.* ([1896] 1 Ch. 978). Proceedings against a company before a magistrate may be restrained pending the hearing of a petition for winding up: *In re Briton, etc., Assurance Ass.* (32 Ch. D. 503). See Seton, pp. 593–610.

Copyright Acts. (6) There is no copyright in racing tips and the like printed in a copyrighted newspaper: *Chilton and Progress Printing Co.* ([1895] 2 Ch. 29). The practice of newspapers copying literary matter from one another is no defence to an action for copyright: *Walter* v. *Steinkopf* ([1892] 3 Ch. 489)†. Information contained in a catalogue, *Collis* v. *Cater* (78 L. T. 613), directory or time-table, *Kelly* v. *Morris* (1 Eq. 697); *Leslie* v. *Young* ([1894] A. C. 335), is copyrighted. So is a *verbatim* report: *Walter* v. *Lane* ([1900] A. C. 539). See *post*, (28), (31), (32), (33).

Executor. (7) An executor who becomes bankrupt after testator's death may be restrained from acting: *Bowen* v. *Phillips* ([1897] 1 Ch. 174.

Highways. (8) Unreasonable use of a highway was enjoined in *A.-G.* v. *Brighton, etc., Ass.* ([1900] 1 Ch. 276). Compare *Sadler* v. *G. W. Ry. Co.* ([1896] A. C. 450); *Barber* v. *Penley* ([1893] 2 Ch. 447); *Chaplin* v. *Westminster Corp.* ([1901] 2 Ch. 329).

Husband and wife. (9) In matrimonial cases the husband may be restrained from going to the wife's house settled to her separate use, *Symon* v. *Hallett* (24 Ch. D. 346); and where alimony is claimed, from dealing with his property: *Waterhouse* v. *W.* ([1893] P. 284); *Newton* v. *N.* ([1896] P. 36); *secus Carter* v. *C.* ([1896] P. 35).

Illegal injuries.

(10) (*a*) No injunction lies against a union of men or combine of masters who induce one another to end or to refuse to enter into contracts in the supposed interests of their trade. It does not matter (1) that their contracts are unenforceable because in restraint of trade, (2) harmful to, (3) and done with a bad motive to others: *Mogul S. S. Co.* v. *McGregor* ([1892] A. C. 25)*; *Allen* v. *Flood* ([1898] A. C. 1)*; *Huttley* v. *Simmons* ([1898] 1 Q. B. 181). "Intentional damage which arises from the mere exercise of the rights of many is not actionable:" per Lord Lindley, in *Quinn* v. *Leathem* ([1901] A. C. 495, 539)*. But (*b*) inducing employer's contractees or employees to break their contracts, *Bowen* v. *Hall* (6 Q. B. D. 333); *Temperton* v. *Russell* ([1893] 1 Q. B. 715); (*c*) inducing employer's (otherwise willing) contractees *and* employees to end or not to enter into contracts with employer, *Quinn* v. *Leathem, supra*; (*d*) picketing if a common law nuisance or an offence within the *Conspiracy Act*, 1875, s. 7, *Lyons* v. *Wilkins* ([1896] 1 Ch. 811; [1899] 1 Ch. 255); *Charnock* v. *Court* ([1899] 2 Ch. 35); *Walters* v. *Green* ([1899] 2 Ch. 696); *Taff Vale Ry. Co.* v. *Amalgamated Soc. of Ry. Servants* ([1901] A. C. 426) (see *post*, p. 396), give rise to an injunction. To resume, (*a*) authorizes lock-outs and strikes as between two parties; (*b*) condemns certain lock-outs and strikes; (*c*) forbids boycotting. How about lock-outs and strikes instigated by third parties and not within (*b*) or (*d*)? "A combination to prevent others from working is *primâ facie* unlawful:" per Lord Lindley, *Quinn* v. *Leathem*, p. 538. In (*b*), (*c*), and (*d*) there are two elements present which were absent in (*a*)—third parties and coercion. If these elements concur they make the acts of combines and unions enjoinable as illegal injuries.

Information if gained for a certain purpose.

(11) The Court will restrain the publication of any valuable information, *e.g.* of tape-prices communicated to a limited public for a limited purpose, *Exchange Telegraph Co.* v. *Gregory* ([1896] 1 Q. B. 147); *Exchange Tel. Co.* v. *Central News* ([1897] 2 Ch. 48), and of confidential information obtained during service, *Tuck* v. *Priester* (19 Q. B. D. 629); *Merryweather* v. *Moore* ([1892] 2 Ch. 518) (drawings); *Lamb* v. *Evans* ([1893] 1 Ch. 218) (advertisements); or indeed any use of it not intended by the master, *Louis* v. *Smellie* ([1895] W. N. 115); *Robb* v. *Green* ([1895] 2 Q. B. 315); *General Accident Ass. Corp.* v. *Noel* (*Times*, December 12, 1901)—cases resembling those, *ante*, p. 348. Equity also protected "confidence" in (6), (13), (14), (24), (32), (44).

Joint tort feasors.

(12) Where the joint acts of two persons constitute a wrong—although their separate act may or may not be actionable—an action for injunction will lie against both, *Thorpe* v. *Brumfitt* (8 Ch. 650), or each: *Lambton* v. *Mellish* ([1894] 3 Ch. 163); *Walters* v. *Green* ([1899] 2 Ch. 696). If the claim is also for damages distinct torts may not be alleged against one or either: *Sadler* v. *G. W. Ry. Co.* ([1896] A. C. 450); *Gower* v. *Couldridge* ([1898] 1 Q. B. 348) (cited [1900] 1 Q. B. 512); *Thompson* v. *London C. C.* ([1899] 1 Q. B. 840). There must be one cause of action: *Frankenburg* v. *Great Horseless Carr. Co.* ([1900] 1 Q. B. 504).

Lectures independently of Statute.

(13) Where a lecture is delivered to an audience limited and admitted by ticket, an injunction may be obtained to restrain the publication of notes taken: *Nicols* v. *Pitman* (26 Ch. D. 374), following *Abernethy* v. *Hutchinson* (3 L. J. Ch. (O. S.) 209); *Caird* v. *Sime* (12 A. C. 326). See (11).

Letters.

(14) In *Pope* v. *Curl* (2 Atk. 341), Lord Hardwicke enjoined the sale of "Letters from Swift, Pope, and others;" and an injunction was granted in *Earl of Lytton* v. *Devey and Swan Sonnenschein & Co.* (52 L. T. 121), where the law was summed up as follows:—"The property in letters remains in the person to whom they are sent. The right to retain them remains in the person to whom the letters are sent, but the sender of the letters has still that kind of interest, if not property, in the letters which gives him a right to restrain any use being made of the communications which he has made in the letters so sent by him. . . . But there is one qualification . . . to that general . . . principle, that is, if the letters contain materials which it is necessary for the sendee . . . to use for his own justification, or for vindicating his character." See (11).

Libel.

(15) It was held in *Prudential Assurance* v. *Knott* (10 Ch. 142) that an injunction could not be granted to restrain the publication of a libel, but the law on this point has been altered.

But the Court will not grant an interlocutory injunction when defendant swears that he can justify, or where the case is not so clear that the Court would set aside a verdict to the contrary as unreasonable: *Liverpool Household Ass.* v. *Smith* (37 Ch. D. 170); *Bonnard* v. *Perryman* ([1891] 2 Ch. 269)*; *Monson* v. *Tussauds* ([1894] 1 Q. B. 671); or unless there is immediate and pressing injury to person or property: *Salomons* v. *Knight* ([1891] 2 Ch. 294). Compare *Collard* v. *Marshall* ([1892] 1 Ch. 571); *Trollope* v. *London Building Trades Federation* ([1895] W. N. 45) (trades' union cases). Most, but not all of these cases (*e.g. Monson* v. *Tussauds*) were "trade libels." A trade libel must be distinguished from a puff: *Mellin* v. *White* ([1895] A. C. 154); *Hubbuck* v. *Wilkinson* ([1899] 1 Q. B. 86).

Light (ordinary).

(16) In *Parker* v. *First Avenue Hotel Co.* (24 Ch. D. 282, 288) it was held that a building may obstruct the light coming to a window if it permits the light to fall on the window at an angle of 45°, but that the question of obstruction is to be determined by the evidence in each case: *City of London Brewery Co.* v. *Tennant* (9 Ch. 212); *Hackett* v. *Baiss* (20 Eq. 497); *Field* v. *Debenham* (2 Ch. D. 165). In *Holland* v. *Worley* (26 Ch. D. 578) the Court exercised its discretion in awarding damages in lieu of injunction, and took into consideration the circumstance that the property was situated in the centre of London; but this case was not followed in *Greenwood* v. *Hornsey* (33 Ch. D. 471); *Martin* v. *Price* ([1894] 1 Ch. 276); *Jordeson* v. *Sutton* ([1899] 2 Ch. 217). During rebuilding the site of ancient windows must not be blocked up: *Smith* v. *Baxter* ([1900] 2 Ch. 138) †; *Pendarves* v. *Monro* ([1892] 1 Ch. 611); a greenhouse may acquire right to light: *Clifford* v. *Holt* ([1899] 1 Ch. 698). An

injunction in favour of an unfinished house was granted in *Collis* v. *Laugher* ([1894] 3 Ch. 659).

Light (extra-ordinary). (17) A landowner *primâ facie* grants ordinary, *Corbett* v. *Jonas* ([1892] 3 Ch. 137), but may grant extraordinary light: *Aldin* v. *Latimer* ([1894] 2 Ch. 437). Extraordinary rights may arise from prescription: *Lazarus* v. *Artistic Photo. Co.* ([1897] 2 Ch. 214); *Warren* v. *Brown* ([1901] W. N. 214).

Lunatics. (18) Persons who are imbeciles without being mad have been restrained from aliening their property: *Ridgeway* v. *Darwin* (8 V. 65) (cited [1898] 1 Ch. 340). See (30).

Malice. (19) Malice is not enjoinable unless it inspires legal wrongs: *Chaffers* v. *Goldsmid* ([1894] 1 Q. B. 186, 191); *Allen* v. *Flood*, *supra*, and (51).

Misrepresentation. (20) Misrepresentation *plus* damage is not enjoinable unless it causes the damage: *Ajello* v. *Worsley* ([1898] 1 Ch. 274).

Mortgage. (21) The Court will only grant an interlocutory injunction restraining the mortgagee from exercising his power of sale if the mortgagor pays into Court the amount sworn by the mortgagee to be due for principal, interest, and costs. But if the Court sees that the amount alleged cannot be due, *Hickson* v. *Darlow* (23 Ch. D. 690), or if the mortgagee was, at the time of taking the mortgage, solicitor of the mortgagor, the Court will fix the amount to be paid in: *Macleod* v. *Jones* (24 Ch. D. 289); Ashburner, p. 351.

Music. (22) *Bonâ fide* music lessons and practising are not enjoinable: *Christie* v. *Davey* ([1893] 1 Ch. 316). See (27).

Names. (23) A peer may not enjoin his divorced wife from using his name: *Cowley* v. *C.* ([1901] A. C. 450). The use of mere names is not enjoinable: *Montreal Lithographing Co.* v. *Sabiston* ([1899] A. C. 610) (trader); *Dockrell* v. *Dougall* (80 L. T. 556) (doctor); *ante*, p. 373. The Court restrains the use of trade names, etc., calculated to mislead buyers: *Reddaway* v. *Banham* ([1896] A. C. 199) *; *Powell* v. *Birmingham Vinegar Brewery Co.* ([1897] A. C. 710) *; applied in *Rockingham R. Co.* v. *Allen* (12 T. L. R. 345); *Saxlehner* v. *Apollinaris Co.* ([1897] 1 Ch. 893); *Pinet* v. *Maison P.* ([1898] 1 Ch. 179); *Daniel* v. *Whitehouse* ([1898] 1 Ch. 685); *North Cheshire Brewery Co.* v. *Manchester Brewery Co.* ([1899] A. C. 83); *Société Anonyme...Panhard et Levassor* v. *P. L. Co.* ([1901] 2 Ch. 513) (foreign plaintiff); *Cash* v. *C.* ([1901] W. N. 46), distinguished in *Parsons* v. *Gillespie* ([1898] A. C. 239); *Cellular Clothing Co.* v. *Maxton* ([1899] A. C. 326).

Negative stipulation. (24) An injunction may be granted to restrain the breach of a negative stipulation, although the contract was a contract for service or some other contract of which specific performance would not be granted, *Donnell* v. *Bennett* (22 Ch. D. 835), following *Lumley* v. *Wagner* (1 D. M. & G. 604); but the negative contract must be express, *Mutual Reserve Fund L. Ass.* v. *New York L. I. Co.* (75 L. T. 528); *Whitwood Chemical Co.* v. *Hardman* ([1891] 2 Ch. 416); *Holford* v. *Acton U. D. C.* ([1898] 2 Ch. 240); severable, *Ryan* v.

Mutual Tontine, etc., Association ([1893] 1 Ch. 116) (cited [1901] 1 Q. B. 523); *Robinson* v. *Heuer* ([1898] 2 Ch. 451); *Grimston* v. *Cuningham* ([1894] 1 Q. B. 125), and reasonable, *Ehrman* v. *Bartholomew* ([1898] 1 Ch. 671) (see *ante*, p. 354); but see *De Mattos* v. *Gibson* (4 De G. & J. 276) (charter party). A contract was held affirmative in form though negative in substance in an exceptional case: *Wolverhampton, etc., Ry. Co.* v. *London & N. W. Ry. Co.* (16 Eq. 433); and *vice versâ*, *Davis* v. *Foreman* ([1894] 3 Ch. 654); *Metropolitan Electric Supply Co.* v. *Ginder* ([1901] 2 Ch. 805–809)†.

Nuisance

(25) In order that the Court may grant an injunction on the ground of interference with personal comfort, there must, as was said in *Walter* v. *Selfe* (4 De G. & S. 323), "be an inconvenience materially interfering with the ordinary comfort, physically, of human existence; not merely according to elegant and dainty modes and habits of living, but according to plain and sober and simple notions among the English people," *e.g.* exceptional noise, *Bartlett* v. *Marshall* (44 W. R. 251); heat, etc., *Sanders-Clark* v. *Grosvenor Mansions Co.* ([1900] 2 Ch. 373). See (1), (8), (12), (16), (17), (22), (26), (40), (41), (43), (46), (51).

under statutory powers.

(26) If the nuisance arises as a necessary consequence of the proper exercise of statutory powers or provisional orders of the Board of Trade, etc., it will not be restrained: *Hammersmith Ry. Co.* v. *Brand* (L. R. 4 H. L. 171); *Metropolitan Asylum District* v. *Hill* (6 A. C. 193)*; *London, B., and S. C. Ry. Co.* v. *Truman* (11 A. C. 45); *Evans* v. *Manchester, etc., Ry. Co.* (36 Ch. D. 626); *Harrison* v. *Southwark, etc., Water Co.* ([1891] 2 Ch. 409); *National Telephone Co.* v. *Baker* ([1893] 2 Ch. 186); *Rapier* v. *London Tramways Co.* ([1893] 2 Ch. 588); *Manchester, etc., Ry. Co.* v. *Anderson* ([1898] 2 Ch. 394); *Canadian Pacific Ry. Co.* v. *Parke* ([1899] A. C. 535); *Jordeson* v. *Sutton Gas Co.* ([1899] 2 Ch. 217).

Obscenity.

(27) As to obscene language in a street, see *Strickland* v. *Hayes* ([1896] 1 Q. B. 290, 643; cited [1900] 1 Ch. 14); *Geutel* v. *Rapps* (xviii. T. L. R. 72).

Organ.

(28) The barrel of a barrel-organ and roll of an Aeolian is not enjoinable as pirated copy: *Boosey* v. *Whight* ([1900] 1 Ch. 122).

Patents, trade marks, etc., under statute.

(29) The practice under the *Patents, Designs, and Trade Marks Act*, 1883, s. 30, was described thus by Jessel, M.R., in *Dudgeon* v. *Thompson* (30 L. T. 244):—"The Court can grant an interlocutory injunction before the hearing where the patent is an old one and the patentee has been in long and undisturbed enjoyment of it, or where its validity has been established elsewhere and the Court sees no reason to doubt the propriety of the result, or where the conduct of the defendant is such as to enable the Court to say that as against the defendant himself there is no reason to doubt the validity of the patent."

By sect. 32 of the same Act threats by circular advertisements or otherwise to take legal proceedings for the alleged infringement of a patent may be restrained by injunction, unless there was an actual infringement, and unless the person who threatens proceeds with an action for infringement with due diligence: *Kensington, etc., Electric Lighting Co.* v. *Lane Fox Electrical Co.* ([1891] 2 Ch. 573); *Johnson* v. *Edge* ([1892] 2 Ch. 1), commenting on *Challender* v. *Royle* (36 Ch. D. 425); *Skinner & Co.* v. *Shew* ([1893] 1 Ch. 413; [1894] 2 Ch. 581); *Douglass* v. *Pintsch's Co.* ([1897] 1 Ch. 176); *Howard Football Synd.* v. *Sykes* ([1897] W. N. 81).

Partnership.

(30) A crazy partner will be restrained from interfering with the partnership, for dissolving which there is a *lis pendens*: *J.* v. *S.* ([1894] 3 Ch. 72). See (18).

Penal statute.

(31) Where a statute creates a new offence and enacts a penalty, *e.g.* the *Copyright Act*, 1842, the ancillary remedy by injunction may be claimed as well as the penalty.

It was decided in *Hayward* v. *East London Waterworks Co.* (28 Ch. D. 138), that the statutory remedy by penalties provided by the *Waterworks Clauses Act*, 1847, had not ousted the jurisdiction of the Court to enjoin the company from cutting off the water-supply. See (36).

Photographs.

(32) In *Pollard* v. *Photographic Co.* (40 Ch. D. 345); *Stedall* v. *Houghton* (xviii. T. L. R. 126), a photographer, who had photographed a lady in order to supply her with copies for money, was restrained from selling or exhibiting her photograph.

Pictures.

(33) Living pictures are not, *Hanfstaengl* v. *Empire Palace* ([1894] 2 Ch. 1), though pictures of living pictures may be, *Hanfstaengl* v. *Baines* ([1895] A. C. 20), and the backgrounds are, *Hanfstaengl* v. *Empire Palace* ([1895] W. N. 76), within the Copyright Acts.

Pumping.

(34) Pumping wet sand, thereby causing subsidence, was enjoined in *Jordeson* v. *Sutton Gas Co.* ([1899] 2 Ch. 217); *ditto*, pitch, *Trinidad Asphalte Co.* v. *Ambard* ([1899] A. C. 594); *secus* water, *Popplewell* v. *Hodkinson* (L. R. 4 Ex. 248). See (51).

Quia timet action.

(35) In a *quia timet* action, *i.e.* an action to restrain an apprehended injury, there must be proof that the apprehended damage is imminent, and will, if it comes, be very substantial: *A.-G.* v. *Corp. of Manchester* ([1893] 2 Ch. 87) (small-pox hospital).

Quo warranto, etc., actions.

(36) Injunctions have been granted where a *quo warranto*, *Aslatt* v. *Corp. of Southampton* (16 Ch. D. 143); *Richardson* v. *Methley School Board* ([1893] 3 Ch. 510); *Turnbull* v. *West Riding Club* ([1894] W. N. 4), or prohibition, *Hedley* v. *Bates* (13 Ch. D. 498), or proceedings before a magistrate under the Public Health Act, *Grand Junction Waterworks Co.* v. *Hampton U. D. C.* ([1898] 2 Ch. 331), or similar Acts, *Stevens* v. *Chown* ([1901] 1 Ch. 894) (see (30)), or surcharging, *A.-G.* v. *Merthyr Tydvil P. L. G.* ([1900] 1 Ch. 516), but not where a *mandamus*, *A.-G.* v. *Clerkenwell V.* ([1891] 3 Ch. 527, 537), is the natural remedy. These powers should be sparingly used: *Standard* v. *St. Giles* (20 Ch. 190); *Grand Junction W. Co.* v. *Hampton U. D. C.*, p. 345.

Railway company.

(37) In *Allgood* v. *Merrybent and Darlington Ry. Co.* (33 Ch. D.

571), the Court granted an injunction at the instance of an unpaid vendor of lands to restrain a railway company from running trains over the land. This was an action for rescission. See *post*, p. 388.

Restraint of trade; restrictive covenants.

(38) See as to covenants in restraint of trade and restrictive covenants, *ante*, pp. 351, 355.

Riparian owner.

(39) Riparian owners are entitled to an uninterrupted flow from the very source of a river, *Mostyn* v. *Atherton* ([1899] 2 Ch. 360), but must prove special danger if water is abstracted and returned unpolluted and undiminished: *Kensit* v. *G. E. Ry. Co.* (27 Ch. D. 122). There is no right to temporary artificial watercourses: *Burrows* v. *Lang* ([1901] 2 Ch. 502).

Rubbish.

(40) Owners are liable for filth shot on to their vacant land by trespassers: *A.-G.* v. *Tod Heatley* ([1897] 1 Ch. 560).

Sewers.

(41) See *Brown* v. *Dunstable* (*Mayor*) ([1899] 2 Ch. 378); *St. Mary Islington* v. *Hornsey U. D. C.* ([1900] 1 Ch. 695); *Eastwood* v. *Honley U. D. C.* ([1901] 1 Ch. 645); *Graham* v. *Wroughton* ([1901] 2 Ch. 451).

Slander.

(42) Oral slander was restrained in *Hermann Loog* v. *Bean* (26 Ch. D. 306).

Smoke.

(43) Smoke: *South London Electric Corp.* v. *Perrin* ([1901] 2 K. B. 186).

Solicitor and client.

(44) In *Little* v. *Kingswood Colliery Co.* (20 Ch. D. 733) an injunction which had been granted to restrain a solicitor from acting for the antagonist of his former client was on appeal dissolved by consent, the solicitor undertaking not to disclose his client's secrets; and see *In re Flint* ([1885] W. N., p. 163).

Statutory prohibition.

(45) Things prohibited by statute are enjoined without proof of damage: *A.-G.* v. *L. and N. W. Ry. Co.* ([1900] 1 Q. B. 78).

Stink.

(46) *A.-G.* v. *Cole* ([1901] 1 Ch. 205); *Parish* v. *London* (*Mayor*) (xviii. T. L. R. 63) (urinal).

Trade libels. (47) See (15).

Trade names. See (23).

Trade unions. (48) See (3), (10), (15).

Vendor's lien. (49) See (37).

Waste. (50) As to waste, see *ante*, pp. 126 *et seq.*

Water.

(51) Even malicious diversion of underground water gives no right to an injunction: *Chasemore* v. *Richards* (7 H. L. C. 349); *Bradford* (*Mayor*) v. *Pickles* ([1895] A. C. 587). See (34), (39).

Waterworks. (52) See (31).

Receiver—Equitable Execution.

ANGLO-ITALIAN BANK *v.* DAVIES.

(9 Ch. D. 275.)

Ex p. EVANS, *In re* WATKINS.

(13 Ch. D. 252.)

SALT *v.* COOPER.

(16 Ch. D. 544.)

Principle.

The Judicature Act, 1873, *has enlarged the powers and shortened the process of appointing a receiver. A judgment creditor against an equitable interest in land obtains the appointment of a receiver without commencing a fresh action, and without suing out a writ of eligit.*

Summary of facts.

In the first case a judgment creditor, who could not get possession of the land under a writ of *elegit* as the legal estate was outstanding in a mortgagee, commenced a fresh action in the C. D. to enforce his judgment, and obtained the appointment of a receiver. The Court leant to the opinion that the appointment might be made on motion in the action in which the judgment was obtained.

In the second case the judgment creditor (who was legal mortgagee) obtained the appointment of a receiver without suing out a writ of *elegit*. It was held that the appointment operated as a delivery of the land in execution, although the receiver had not given security, and constituted the creditor a "secured creditor" in the bankruptcy of the debtor.

In the third case it was held that so long as final judgment in an action is unsatisfied, the action is "a cause or matter pending" within the meaning of the Judicature Act, so that equitable execution will be granted on motion made in the original action after final judgment.

Appointment of receivers.

Receivers are not appointed of a debtor's property generally: *Hamilton* v. *Brogden* ([1891] W. N. 14).

Receivers of specific property of a debtor were appointed by the Court of Chancery "in aid of a judgment at law, where the plaintiff showed that he had sued out the proper writ of execution and was met by certain difficulties arising from the nature of the property, which prevented his obtaining possession at law," per Davey, L.J., *Harris* v. *Beauchamp* ([1894] 1 Q. B. 801, 809)*; S. C. *nomine Lovell* v. *Beauchamp* ([1894] A. C. 607), *e.g.* (*a*) a legal estate outstanding, such as a mortgage, as in the leading cases, or even a prior estate, *In re Jones and Judgments Act* ([1895] W. N. 123) (cited [1899] 1 Ch. 472); (*b*) a lien or the like, *Levasseur* v. *Mason* ([1891] 2 Q. B. 73); and (*c*) in the case of tolls.

Judicature Act, 1873, s. 25, sub-s. 8.

Sect. 25, sub-sect. 8 of the *J. Act*, 1873, provides (*inter alia*) that a receiver may be appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be "just or convenient" that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just.

When appointed.

In spite of this section the broad rule is that a receiver will not be appointed where a *fi. fa. elegit*, attachment, garnishee, winding up, or bankruptcy proceedings are equally available: *Harris* v. *Beauchamp*, cited *ante*, p. 374; *Manchester, etc., Banking Co.* v. *Parkinson* (22 Q. B. D. 173). Thus future earnings will not be taken by a receiver on behalf of a judgment debtor, because this could not be done before 1873, *Holmes* v. *Millage* ([1893] 1 Q. B. 551); *Cadogan* v. *Lyric Theatre* ([1894] 3 Ch. 338), *infra* (3), (6), etc.; and the exceptions, *infra*, (4, *a*), (7, *b*), (12, *b*), (17, *b*), prove the rule. The old weapon is put into new hands.

Nature and effect of appointment.

27 & 28 Vict. c. 112. *Judgments Act*, 1864.

And the effect produced by his appointment is the same as of old. Thus the *Judgments Act* (27 & 28 Vict. c. 112), s. 1, provides that "No judgment, statute, or recognizance to be entered up after the passing of this Act shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority, in pursuance of such judgment, statute, or recognizance." Although the appointment of a receiver is only a mode of relief, applicable only when the right parties are before the Court, *In re Sheppard* (43 Ch. D. 131), yet it is a "delivery in execution" by some "other lawful authority" within the meaning of this Act, after which the creditor has a charge and can proceed to a sale under sect. 4: *Hatton* v. *Haywood* (9 Ch. 229): compare *Blackman* v. *Fysh* ([1892] 3 Ch. 209); contrast *Norburn* v. *N.* ([1894] 1 Q. B. 448). But this rule is inapplicable where the debtor has no "present seisin of or present interest in" his land: *In re Harrison* v. *Bottomley* ([1899] 1 Ch. 465), nor to personalty: *In re Dickinson* (22 Q. B. D. 187) (present stock-in-trade); *Flegg* v. *Prentis* ([1892], 2 Ch. 428); *Tyrrell* v. *Painton* ([1895] 1 Q. B. 202) (equitable reversionary proceeds of sale of land, etc.); *Ex parte Taylor* ([1893] 1 Q. B. 648) (legacy); *Croshaw* v. *Lyndhurst Ship Co.* ([1897] 2 Ch. 154) (ship); compare *In re South* (9 Ch. 369). In such cases the order creates no charge, but operates practically as a veto, and theoretically as an injunction against the debtor from entering into possession.

"Just and convenient."

But the words of the Act, "just and convenient," are new. The chief meaning to be given to those words is defined by the rules and the leading cases. The rules say that the Court must have regard to (*a*) the amount of the debt, (*b*) the amount which the receiver will probably recover, (*c*) the costs of his appointment (R. S. C., 1883, Order L., r. 15 (*a*)).

The leading cases.

The leading cases curtailed procedure. Thus the opinion expressed in the first formed the groundwork of the judgment in the third l.c., and was followed in *Smith* v. *Cowell* (6 Q. B. D. 75).

In the second the issue of a writ of *elegit* as the condition precedent of equitable execution was abolished as "an idle form, and wholly unnecessary now that there is only one system of judicature." Indeed, Lord Cottenham had also condemned the practice long ago: *Neate* v. *Duke of Marlborough* (3 My. & C. 407; but his condemnation had been futile until now. In the third, the Court adopted a view as to how long an action is pending which was adopted under different circumstances in *In re Clagett's E.* (20 Ch. D. 627).

The following examples explain themselves:—

Administration actor or executor.

(1) Receivers are appointed to prevent (*a*) an executor preferring creditors, *In re Radcliffe* (7 Ch. D. 733), but see *Phillips* v. *Jones* (28 Sol. J., 360); (*b*) waste of assets, *In re Wells* (45 Ch. D. 569), *ante*, p. 215; (*c*) and where a sole executor becomes bankrupt, *Bowen* v. *Phillips* ([1897] 1 Ch. 174); *Gawthorpe* v. *G.* ([1878] W. N. 91). But now a judicial trustee can be appointed in these cases (59 & 60 Vict., c. 35, s. 1). Money in the hands of a receiver of a deceased person's estate is subject to the same liabilities as if it had been in the hands of executors: *In re Hoare* ([1892] 3 Ch. 94).

It is not the modern practice to allow the receiver to carry on an action in the name of a bankrupt executor: *In re Hopkins* (19 Ch. D. 61).

Debenture holders.

(2) Debenture holders of a charge on the business or even property, *Makins* v. *Percy Ibotson* ([1891] 1 Ch. 133); *In re Henry Pound, etc.* (42 Ch. D. 402); *In re Joshua Stubbs* ([1891] 1 Ch. 475); *Strong*

v. *Carlyle Press* ([1893] 1 Ch. 268); *British Liner Co.* v. *S. American Co.* ([1894] 1 Ch. 108), can obtain the appointment of a receiver-manager if the security is in jeopardy, even before default is made: *Edwards* v. *Standard R. S. Syndicate* ([1893] 1 Ch. 574); *McMahon* v. *North Kent Ironworks Co.* ([1891] 2 Ch. 148), cited ([1899] 1 Ch. 894); *In re Victoria Steamboats* ([1897] 1 Ch. 158), even where they have already appointed one but improperly, *In re Maskelyne Typewriter* ([1898] 1 Ch. 133); *secus* if the debentures are provisional, *Thorne* v. *Nine Reefs* (67 L. T. 93), or in a public undertaking, *Blaker* v. *Herts Waterworks Co.* (41 Ch. D. 399); but see *Bartlett* v. *West Metropolitan Tramways Co.* ([1893] 3 Ch. 437), cited ([1895] 2 Ch. 54), or if such appointment would be futile: *Mercantile Investment Co.* v. *River Plate Trust Co.* ([1892] 2 Ch. 303); see, too, *Companies Clauses Act*, 1863, ss. 25, 26; *Companies Winding-up Act*, 1890, s. 4 (6).

Directors.

(3) Directors' fees are not a proper subject for a receiver because they can be attached: *Hamilton* v. *Brogden* ([1891] W. N. 36).

Ejectment.

(4) (*a*) In *John* v. *J.* ([1898] 2 Ch. 573) defendant held land by a legal title: yet, the circumstances being special, a receiver was appointed in an ejectment action.

(*b*) In *Foxwell* v. *Van Grutten* ([1897] 1 Ch. 64) the Court refused a similar application.

Foreclosure.

(5) After foreclosure absolute he may not be appointed: *Wills* v. *Luff* (38 Ch. D. 197). Where rents are received by him between date of certificate and date fixed for redemption, a further account will be ordered and further time given (a month) to the mortgagor to redeem, *Jenner-Fust* v. *Needham* (32 Ch. D. 582), unless, as in *Ellenor* v. *Ugle* ([1895] W. N. 161), the amount received is small. *Jenner-Fust* v. *Needham* was followed in *Peat* v. *Nicholson* (34 W. R. 451), and distinguished in *Ingham* v. *Sutherland* (63 L. T. 614) and in *Coleman* v. *Llewellin* (34 Ch. D. 143), which case North, J., declined to follow in *Cheston* v. *Wells* ([1893] 2 Ch. 151).

As to occupation rent payable by mortgagor in possession to receiver, see *Yorkshire Banking Co.* v. *Mullan* (35 Ch. D. 125).

Infant.

(6) A receiver will not be granted of a partnership in order to enforce a debt, if one of the partners is an infant, because such receiver could not have been appointed before the *J. Act*, 1873: *Harris* v. *Beauchamp* ([1894] 1 Q. B. 801).

Judgment creditor.

(7) Equitable execution has been granted against debts (*a*) to which garnishee proceedings were not applicable, *e.g.* taxed costs directed to be paid to a solicitor out of a fund standing in the Palatine Court, *Westhead* v. *Riley* (25 Ch. D. 413), (*b*) to which an *elegit* was applicable, but there were prior equitable incumbrances: *In re Pope* (17 Q. B. D. 743); *ante*, p. 384.

Lessee tenant for life.

(8) In *In re Fowler* (16 Ch. D. 723), the tenant for life of leasehold houses had received the rents, but did not keep them in repair. So the Court, at the instance of a trustee, appointed a receiver. See (18). Compare *ante*, p. 131.

Lunatics.

(9) Receivers and receiver—managers of the property of lunatics and imbeciles are appointed: *In re Pountain* (37 Ch. D. 609) (*ex p.*); *In re Browne* ([1894] 3 Ch. 412); *In re Clarke* ([1898] 1 Ch. 340, 341); *Winkle* v. *Bailey* ([1897] 1 Ch. 123); *In re B. A. S.* ([1898] 2 Ch. 392); *Davies* v. *Thomas* ([1900] 2 Ch. 462); *In re Taylor* ([1901] 1 Ch. 480). A lunatic's committee is not, like a receiver and manager, personally liable to contractees: *Isaacs* v. *Chinery* (74 L. T. 320).

Manager.

(10) "If a receiver was appointed of partnership assets the trade stopped immediately. . . . If it was desired to continue the trade at all it was necessary to appoint a manager:" per Jessel, M.R., in *In re Manchester and Milford R. Co.* (14 Ch. D. 653).

Where a mortgage includes the business as well as the place of business, a receiver-manager may be appointed: *County of Gloucester B.* v. *Rudry, etc., Co.* ([1895] 1 Ch. 629); *Campbell* v. *Lloyd's B.* ([1891] 1 Ch. 136, n.). Similarly with a mortgage of an hotel with its goodwill and licenses: *Truman* v. *Redgrave* (18 Ch. D. 547) (see order); *secus* where the business, etc., is not included: *Whitley* v. *Challis* ([1892] 1 Ch. 64); *In re Bennett* ([1899] 1 Ch. 316); *Marshall* v. *South Staffordshire Tramways Co.* ([1895] 2 Ch. 36). He is personally liable to contractees: *Burt* v. *Bull* ([1895] 1 Q. B. 276); *secus* if appointed as under the C. A., 1881; *Owen* v. *Cronk* ([1895] 1 Q. B. 265); *Gosling* v. *Gaskell* ([1897] A. C. 575). As between him and outsiders he is as it were caretaker of the mortgagors, if appointed by the Court, *Paterson* v. *Gas, etc., Co.* ([1896] 2 Ch. 476); *Hand* v. *Blow* ([1901] 2 Ch. 721); *In re Marriage* ([1896] 2 Ch. 663) or (possibly) under a power (?), *ib.*; but see *Richards* v. *Kidderminster Overseers* ([1896] 2 Ch. 212), and a new tenancy does not begin because there is no change of possession.

Married woman's property.

(11) Claims against the free separate property of a married woman are enforced by an order appointing a receiver or directing the trustees to pay. Such an order may be obtained in an action brought for that purpose, or, where proceedings are already pending, without any fresh action: *In re Peace and Waller* (24 Ch. D. 405, 407) (see Order). Compare *Fuggle* v. *Bland* (11 Q. B. D. 711), followed in *Tyrrell* v. *Painton* ([1895] 1 Q. B. 202); *Cummins* v. *Perkins* ([1899] 1 Ch. 16). In *Colyer* v. *Isaacs* (77 L. T. 198); *Hill* v. *Cooper* ([1893] 2 Q. B. 85), the property was restrained for anticipation; and see *ante*, pp. 114 *et seq.*, 124.

Mortgagee.

(12) The Court may appoint a receiver even (*a*) in cases where the mortgagee has power to appoint a receiver under the *C. Act*, 1881, s. 19: *Tillett* v. *Nixon* (25 Ch. D. 238); *Mason* v. *Westaby* (32 Ch. D. 206); *In re Prytherch* (42 Ch. D. 590); (*b*) and since 1875, where he is legal mortgagee: *In re Pope* (17 Q. B. D. 749). Thus in *Pease* v. *Fletcher* (1 Ch. D. 273) a receiver was appointed over property as to part of which the plaintiff was legal and as to part equitable mortgagee. (*c*) A receiver under the *C. Act*, 1881, is mortgagor's agent; but see *Woolston* v. *Ross* ([1900] 1 Ch. 788). Compare *In re Hale* ([1899] 2 Ch. 107).

Officers' pensions.

(13) Pensions of officers being inalienable cannot be so taken: *Lucas* v. *Harris* (18 Q. B. D. 127), cited ([1895] 2 Q. B. 120, 121); *Crowe* v. *Price* (22 Q. B. D. 429).

Partnership property.

(14) A manager is only appointed in dissolution actions. See *ante*, (10); Lindley on Partnership, 6th ed. p. 531 *et seq.*, who discusses the distinction between cases in which there is a contest between partners and late partners, and cases in which the contest is between partners or late partners on the one side and non-partners on the other; *Partnership Act*, 1890, s. 23; *Taylor* v. *Neate* (39 Ch. D. 538); *Niemann* v. *N.* (43 Ch. D. 198).

The existence of an agreement to refer disputes to arbitration will not deter the Court from appointing a manager: *Pini* v. *Roncoroni* ([1892] 1 Ch. 633). A solvent partner will be appointed manager in preference to a nominee of the trustee in bankruptcy of his partner: *Collins* v. *Barker* ([1893] 1 Ch. 578).

Railways.

(15) *The Railway Companies Act*, 1867, s. 4, substitutes a receiver or manager for a *fi. fa.* in case of railways. See *In re Knott End* ([1901] 2 Ch. 8). In an action for specific performance vendor's lien was enforced by means of a receiver in *Munns* v. *Isle of Wight Ry. Co.* (5 Ch. 414). Contrast *Latimer* v. *Aylesbury Ry. Co.* (9 Ch. D. 385). See *ante*, p. 381, (37).

Receiver a trustee.

(16) A receiver has the same rights against the assets for his costs, charges, and expenses as a trustee: *Batten* v. *Wedgwood Coal Co.* (28 Ch. D. 317); *Strapp* v. *Bull* ([1895] 2 Ch. 1); *plus* a right like any agent to charge for services: *Harris* v. *Sleep* ([1897] 2 Ch. 80); *In re Bignell* ([1892] 1 Ch. 59). Contrast *In re Vimbos* ([1900] 1 Ch. 470), although he is, strictly speaking, neither agent nor trustee, but officer of the Court: *Bacup Corp.* v. *Smith* (44 Ch. D. 398); *In re Flowers* ([1897] 1 Q. B. 14). He is a trustee of money in his hands: *Seagram* v. *Tuck* (18 Ch. D. 296), *ante*, p. 204.

Trust property.

(17) (*a*) In *In re H.'s Estate, H.* v. *H.* (1 Ch. D. 276), the defendant, a trustee, being on the eve of bankruptcy, a receiver was appointed on an *ex parte* application before service of the writ. (*b*) In *In re Coney* (29 Ch. D. 993) the Court appointed a receiver of the equitable interest of a defaulting and absconding trustee. In this case a *fi. fa.* might have been available.

Vendor and purchaser.

(18) (*a*) In an action for rescission of contract for the sale of leaseholds a receiver was appointed: *Cook* v. *Andrews* ([1897] 1 Ch. 266), for the same reason as in (8). (*b*) For vendor's lien see (15).

Practice.

A few notes on practice are appended.

Endorsement of writ.

In *Colebourne* v. *C.* (1 Ch. D. 690) it was said that if the appointment of a receiver is the substantial object of the action, the endorsement of the writ should claim it, but this is not essential: *Norton* v. *Gover* ([1877] W. N., p. 206); *Salt* v. *Cooper* (*ubi supra*).

Originating summons.

A receiver may be appointed in a proceeding commenced by originating summons: *Gee* v. *Bell* (35 Ch. D. 160); *Weston* v. *Levy* ([1887] W. N. 76), either in Court or in Chambers, and whether before or after the hearing in Chambers: *In re Franke* (58 L. T. 305).

Motion or summons. Except as above, and in certain special cases, a receiver is always appointed by the C. D. and Bankruptcy Court on motion in Court, by the K. B. D. on summons in Chambers; but no appointment will be made *ex parte* except in very special circumstances: *Taylor* v. *Eckersley* (2 Ch. D. 302); *In re Pountain* (37 Ch. D. 609); *In re Shephard* (43 Ch. D. 131); *Ex p. Taylor* ([1893] 1 Q. B. 661); *In re Goudie* ([1896] 2 Q. B. 481) (bankruptcy); *Minter* v. *Kent Land Society* (72 L. T. 186); *Tilling* v. *Blythe* ([1899] 1 Q. B. 557).

Receiver's security, etc. The practice with regard to the security, etc., where receivers are appointed, is contained in R. S. C., Order L., r. 15A *et seq.* See notes to r. 16 in the *Annual Practice*, 1902.

Interim receiver. A receiver is not duly constituted until he has given security: *Edwards* v. *E.* (2 Ch. D. 291). In pressing cases, an interim receiver may be appointed without security: *Taylor* v. *Eckersley* (2 Ch. D. 302).

Registration. In order that the appointment of a receiver may affect land, it must be registered under the *Land Charges Registration and Searches Act*, 1888 (51 and 52 Vict. c. 51), s. 5, at the office of the Land Registry, in the name of the person whose land is affected by the writ or order registered. Registration of a writ or order is effective for five years from its date, and may be renewed for a similar period. Sect. 6 protects purchasers for value against unregistered writs and orders (as to previous law, see *In re Pope* (17 Q. B. D. 743)), but preserves the effect of registration of a *lis pendens*. As to vacating registrations, see *S. L. Act*, 1890, s. 19. And see Wolstenholme and Brinton's Conveyancing Acts, etc., 8th ed.

Contempt. Interference with the possession or business of a receiver is a contempt of Court, which may be punished by committal or restrained by injunction: *Helmore* v. *Smith* (2) (35 Ch. D. 449).

Relief against receiver. Relief against the receiver is granted in the action in which he was appointed: *Searle* v. *Choat* (25 Ch. D. 723).

Influence of Equity upon Practice under the Judicature Acts.

NEWBIGGIN-BY-THE-SEA GAS COMPANY *v.* ARMSTRONG.

(13 Ch. D. 310.)

NURSE *v.* DURNFORD.

(13 Ch. D. 764.)

Principle.

Where no rule of practice is laid down by the orders under the Judicature Acts, and there is a variance between the former practice of the Courts of Chancery and Common Law, that practice which is considered by the Court to be the better and more convenient is to prevail.

Summary of facts.

In both these cases solicitors had commenced actions without the authority of the persons whose names were employed as plaintiffs. The actions were dismissed, and the solicitors, in accordance with the practice which had previously prevailed at common law, were ordered to pay all costs, the costs of the plaintiff as between solicitor and client, and the costs of the defendants as between party and party.

General view of equity.

This book ends as it began with a chapter on "Convenience." Convenience is the characteristic watchword of equity. It dominates its foreign as well as its home policy. On the one hand, overlapping between British and foreign Courts, between legal and equitable execution, between the discretion of trustees and of the Court, is "inconvenient;" on the other hand, cast-iron laws as to space limits, time limits, or limits as to subject-matter, are "inconvenient." On the one hand, it is "convenient" to mimic common law and statute law where cases are analogous; on the other hand, forms of procedure like the representative action *infra*, unknown to common or statute law, have been invented on the sole score of "convenience." "Convenience" is the formula under which it justifies at once its originality and its subservience, and reconciles progress with routine. The *Judicature Acts* prescribe that "convenience" shall regulate the use of injunctions and receivership, and have thereby extended two of its springs of new developments to every branch of the High Court. And the spirit of the Act, pervaded as it is by equity, prescribes that the same rule of convenience shall guide procedure sometimes in the direction of a greater uniformity, sometimes of greater elasticity.

Three classes of cases.

This chapter will be divided into three parts: I. cases where the Chancery Division has borrowed from common law procedure and *vice versâ*; II. where the procedure, being originally derived from equity, equitable precedents have with necessary modifications prevailed; III. where Chancery and other procedure have continued to flow in different channels.

I. Unauthorized use by solicitor of name of a plaintiff. Former common law and Chancery practice contrasted.

I. The two leading cases are the most conspicuous examples of adoption by the Ch. D. of Common Law instead of Chancery methods. According to the old practice of the Court of Chancery, defendant was left to "get his costs from the person named as plaintiff, who had afterwards to get those costs over from his solicitor. The result was that the nominal plaintiff, who had never given any authority for the use of his name, had to pay the defendant's costs, and might be unable to recover them by reason of the insolvency of his solicitor:" per Jessel, M.R., in the first l.c.; see *Palmer* v. *Walesby* (3 Ch. 732).

Common law practice adopted.

"The question is, which practice must now be followed. Since the passing of the *J. Act* that must be left to the Court to determine. By the 21st section of the *J. Act*, 1875, it is enacted that in cases where no new method of procedure is prescribed the old practice is to prevail, but where there is a variance in the practice it does not say which practice. I have no hesitation in saying that I think the common law practice in this case is founded in natural justice, and ought to be followed in the future," and he accordingly rejected the rule in equity and adopted the common law rule. A similar order, as to which see *Nurse* v. *Durnford* (p. 768), was made in *John Morley Building Co.* v. *Barras* ([1891] 2 Ch. 386, 394).

In the following cases the l.c. were directly followed:—

Cases where the leading cases were followed.

(1) "As a general rule the solicitor who acts without authority should be made to pay the costs:" per Jessel, M.R., *In re Savage* (15 Ch. D. 557, 560); *Cape Breton Co.* v. *Fenn* (17 Ch. D. 210); *Fricker* v. *Van Grutten* ([1896] 2 Ch. 649); *Gold Reefs of W. Austr.* v. *Dawson* ([1897] 1 Ch. 115); *Geilinger* v. *Gibbs* ([1897] 1 Ch. 479).

(2) He is not so liable until or unless he knows, or ought if reasonably diligent to know, that he has not authority, *e.g.* in cases of a lunatic whom he deems sane, *In re G. Armstrong* ([1896] 1 Ch. 536), or a company which he deems existent: *Salton* v. *New Beeston Cycle Co.* ([1900] 1 Ch. 43).

(3) In *Schjott* v. *Schjott* (19 Ch. D. 94), a next friend commenced an action without the authority of the married woman for whom he acted. The practice usual in the case of infants was adopted, and the

action was dismissed with costs against the next friend's solicitor (see Daniel's Chancery Forms, p. 42).

(4) In *In re Scoles and Son* (32 Ch. D. 245), following *Wray* v. *Kemp* (26 Ch. D. 169), a country solicitor was duly retained by a client and duly employed London agents. The latter put their name on the writ as principals. It was held that proceedings initiated by them were initiated without authority from the client.

Other similar cases.

In the following cases a principle similar to that of the l.c. was applied:—

Arbitration.

(5) In arbitrations, Chitty, J., said, "I shall do right to follow the common law practice by adapting it to the ordinary mode of procedure in the Ch. D.:" *Mercier* v. *Pepperell* (19 Ch. D. 58). Accordingly grounds of objection must be specified in a motion to set awards aside (*ib.*), and submission is made a rule of Court: *Jones* v. *J.* (14 Ch. D. 593). See *Arbitration Act*, 1889.

Counsel's consent.

(6) In *Harvey* v. *Croydon Union R. S. A.* (26 Ch. D. 249) the practice of the K. B. D. was adopted, viz. that where a consent to an order is given by counsel with the authority of his client, it cannot arbitrarily be withdrawn, though if there be mistake, surprise, or any sufficient ground, an application may be made to set it aside. See *In re West Devon Great Consols Mine* (38 Ch. D. 51); *Lewis's* v. *Lewis* (45 Ch. D. 281); *Elsas* v. *Williams* (52 L. T. 39). See *ante*, p. 111.

Endorsement of consequences.

(7) In *Thomas* v. *Palin* (21 Ch. D. 360), Jessel, M.R., said: "According to the old Chancery practice it was necessary that the copy served of every order requiring a thing to be done within a limited time should have an indorsement telling the person who was required to obey the order the consequences of not obeying it." At common law there was no indorsement, "and a man had to look out for himself as regards a *fi. fa.* or any other process for disobedience." It was decided to transfer the common law practice to Chancery practice on two grounds; first, it was wrong to have a different practice in different Divisions in a matter like this, "for to do so would upset the whole scheme of the Act;" secondly, it was a superfluous practice: "every man served with an Order of Court must know that it is not *brutum fulmen*."

Ne exeat regno.

(8) In modern times the writ *ne exeat regno* has been only known as the Chancery equivalent for common law arrest on mesne process; which it has, so to speak, shadowed. This peculiarity of Chancery procedure—its tendency to imitate what it supplements—has been already exemplified in Partition actions, pp. 142 *et seq.* Accordingly, when the *Debtors Act*, 1869, s. 6, confined arrest on mesne process to cases where the debtor was about to abscond, the Courts of Equity would probably have said: "As our process of *ne exeat regno* is only issued because the debt is equitable, we must not issue it except where the Common Law Courts would issue process in case of legal debts." Whether it would have reasoned thus was never decided, because the first case on the subject arose in 1879, *Drover* v. *Beyer* (13 Ch. D. 242); and in this case the Ch. D. had regard to the general scope

and spirit of the J. Acts, and cut its cloth so as to fit the shrunken arm of the common law.

Q. B. D. adopts Chancery practice.

(9) In *La Grange* v. *McAndrew* (4 Q. B. D. 210) the rule of equity was adopted as most convenient, and the Divisional Court dismissed the action where the plaintiff had failed to comply with an order requiring him to give security for costs, without requiring the defendant to first abandon the order for security for costs.

(10) In *Callen* v. *Knowles* ([1898] 2 Q. B. 380) a necessary party who refused to join as co-plaintiff was made co-defendant on the analogy of mortgage actions. The action was an *assumpsit.*

II. Procedure borrowed from equity.

II. In equitable actions and in procedure derived from equity, equitable rules prevail.

Penal costs and equitable actions.

Thus in actions to recover trust money and the like the Court may exercise the old power vested in the Court of Chancery of giving costs between solicitor and client: *Andrews* v. *Barnes* (39 Ch. D. 133)*; *In re Godfrey* (71 L. T. 86).

Receivers.

In an action in the K. B. D. relating to a receiver of mortgages of a property, if the Court refers to a master to report on the mortgages, and he reports that they are valid, the Court must if asked review his report in accordance with Chancery practice: *Walmsley* v. *Mundy* (13 Q. B. D. 807). See *ante*, pp. 383 *et seq.*

Other equitable procedure.

Injunctions and procedure under the *M. W. P. Act*, 1882, s. 17, have already been discussed; discovery, whether by interrogatories or by inspection of documents, and representative actions remain to be discussed.

Discovery.

Discovery was of the very essence of a bill for relief in equity; but was almost unknown at common law before *Lord Brougham's Act* (14 & 15 Vict. c. 99, s. 6) and the *Common Law Procedure Act*, 1854; and the chief exception was in those rare cases where the Common Law Courts imagined that they discerned a trust. Thus although essentially equitable in its origin, it has drawn to itself in certain common law actions a common law tradition.

The authorities on discovery establish three propositions—

Old Chancery interpretation of new acts.

(1) The Judicature Acts and Rules (O. XXXI.) have been substituted for the former practice, but in interpreting them the Ch. D. and the K. B. D. will, as a rule, be guided by Chancery precedents. "The proper practice as to the discovery of documents no longer depends upon the Orders of the Court of Chancery or the Common Law Procedure Acts, or the custom or practice of the Common Law Courts," but on the J. Acts and Rules; in which "the extended principles of the Court of Chancery were followed rather than the narrower practice of the Court of Common Law, which, however, was itself derived from the practice in equity:" per Brett, L.J., in *Jones* v. *Monte Video Gas Co.* (5 Q. B. D. 556); this case was decided on old Chancery practice, "as the orders and rules under the J. Acts were made in imitation of it" (*ib.*). The actual point decided has long been superseded: *White* v. *Spafford* ([1901] 2 K. B. 241). Compare *Anderson* v. *Bank of British Columbia* (2 Ch. D. 644).

Common law tradition followed at common law.

(2) Where the Common Law Courts have already established a tradition in the matter of discovery, they will follow it, if they consider it reasonable. Thus the old practice has been followed in cases where Chancery practice must be accommodated in order to suit common law actions; when, so to speak, the Chancery idioms if literally translated into the language of common law yield unsatisfactory results.

Thus to take the simplest case conceivable: The practice in the Ch. D. is that documents ought to be deposited at the Central Office, and to allow them to be produced at the (London) solicitor's office is an indulgence. The practice in the Q. B. D. is that the (London) solicitor's office is the proper place of production. It was suggested in *Brown* v. *Sewell* (16 Ch. D. 517) by Jessel, M.R., that a rule ought to be made making the practice of both Divisions uniform. No such rule, however, has yet been issued. The reason for this rule is that the old Common Law Courts had no place where the documents could be deposited, and was therefore obliged to make a free paraphrase, so to speak, of the Chancery rule. Or to take a question more nearly affecting the rights of parties: "In a large majority of cases at common law," said Mellish, L.J., "it is not possible until the defence is delivered to tell whether interrogatories are material . . . the cases in which they would be allowed are the more frequent in equity where the plaintiff wants an answer in order to know how to amend his claim and to frame his case. These cases very seldom occur at common law:" *Mercier* v. *Cotton* (1 Q. B. D. 442), a case in which the Court read old common law practice into the new forms applicable to a common law action of libel. Similarly discovery precedes particulars more often in equitable than in legal actions: *Zierenberg* v. *Labouchere* ([1893] 2 Q. B. 183), as cited in *Waynes Merthyr Co.* v. *Radford & Co.* ([1896] 1 Ch. 29).

Old Chancery practice as to discovery and privilege followed in equity.

(3) (*a*) Rules of Chancery practice will still be followed in equitable actions, although the Court sees no necessity why they should continue to exist: *Lyell* v. *Kennedy* (8 A. C. 217)*. In that case plaintiff, who was assign of Duncan's heir, brought an action to recover possession of real estate, and defendants claimed a possessory title. Plaintiff interrogated defendant as to Duncan's pedigree, and as to alleged admissions by defendant that he was Duncan's trustee or agent. Defendant was allowed to refuse to answer these questions on the ground of privilege.

Ordinary rule as to privilege.

Ordinary matters "were governed by two cardinal rules:" "First the right as a general proposition of every plaintiff to a discovery of the evidences which relate to his case, and secondly, the privilege of every defendant to withhold a discovery of the evidences which exclusively relate to his own:" per Lord Selborne (8 A. C. 225), citing Wigram's Discovery, 2nd ed. p. 14, or, as Lord Blackburn said in *Lyell* v. *Kennedy* (2) (9 A. C. 81), defendant as well as plaintiff is entitled "to search his opponent's conscience and to inquire from him not only what he has seen or known himself, but all of which he has acquired knowledge or belief from his agents;" subject to the three following qualifications:—

(i.) A client has a privilege to prevent his legal adviser from disclosing any information which he obtains when so employed.

(ii.) The privilege extends to all papers prepared by the legal adviser "as professional communications in a professional capacity," whether in relation to litigation or not, *Minet* v. *Morgan* (8 Ch. 361)*, citing *Lawrence* v. *Campbell* (4 Dr. 485, 490); *Bullivant* v. *A.-G. of Victoria* ([1901] A. C. 196), or for the legal adviser and his client for the purposes of past, *Calcraft* v. *Guest* ([1898] 1 Q. B. 759)†; *Goldstone* v. *Williams* ([1899] 1 Ch. 47)†, or future litigation: *Wheeler* v. *Le Marchant* (17 Ch. D. 675): *Learoyd* v. *Halifax Banking Co.* ([1893] 1 Ch. 690). Your opponent has no right to say, "Show me your brief" (9 A. C. 86).

(iii.) Opinion and belief derived from privileged communications is privileged. You cannot ask, "What is the belief which you have derived from reading that brief?" It was pointed out, however, that if a man has certain knowledge in the ordinary course of things independently of his solicitor, he cannot claim privilege because he learnt it also from his solicitor; *e.g.* if he was told by his solicitor's brief that a tombstone was in a certain place, and if he then went and saw it, he could not claim privilege (9 A. C. 87).

But there are cases where privilege may not be claimed. Fraud is one case: *Williams* v. *Quelrada R. Co.* ([1895] 2 Ch. 751): contrast *Bullivant* v. *A.-G. of Victoria* (*ubi supra*).

Privilege in cases of fraud.

Privilege in ejectment actions.

In *Lyell* v. *Kennedy* (1) the C. A. had held that ejectment actions also barred privilege because, they said, in the time when bills of discovery were the only relief of which common law claimants to land could avail themselves, bills of discovery in aid of an ejectment were unknown.

But although unknown to the C. A., Mr. MacClymont knew of fifty-seven such bills in the time of Elizabeth, and others in the time of Lord Nottingham; and these cases induced the House of Lords to abolish the inequality which was alleged to exist between actions of ejectment and other actions.

The arguments for and against the conclusion depended on the right answer to the question, What would the Chancery Court have done two hundred or three hundred years ago?

Two apparent exceptions; purchaser and discovery.

(*b*) Rule (*a*) is subject to an apparent exception. Thus, in cases where a bill of discovery could not have been filed as principal relief, but discovery would have been granted as auxiliary relief, discovery will be granted now. Suppose, however, discovery was claimed in equity against a purchaser for value without notice, discovery would be granted; if claimed at law, a bill of discovery would not be granted. In such cases equity will no longer regard this defence—purchase for value without notice—as any defence to a claim for discovery, whether such claim is made in an action in which the Chancery Court had concurrent jurisdiction with the Common Law Courts (as in the case of dower) or in any other action (*e.g.* ejectment): *Ind, Coope & Co.* v. *Emmerson* (12 A. C. 300).

Discovery and affidavit of documents.

(*c*) Rule (*a*) is subject to a second exception, in that an affidavit of documents used formerly to specify the documents for which privilege was claimed by describing them; now it is sufficient to specify them as "documents numbered 1 to 26," tied up in a bundle marked "A," and initialled by me, and to claim privilege on the ground that they relate solely to my case and do not help yours: *Budden* v. *Wilkinson* ([1893] 2 Q. B. 432), following *Morris* v. *Edwards* (15 A. C. 309), *Ind, Coope & Co.* v. *Emmerson* (12 A. C. 300), and the principle of cases like that of *Hall* v. *Truman, Hanbury & Co.* (29 Ch. D. 307). That principle may be stated thus: Formerly (some forty years ago) there used to be an irregular war on the subject of interrogatories, so that every motion day was skirmishing day. "That flourishing of weapons before the parties got to the trial of a suit in equity became a most formidable inconvenience" (*ib.*, p. 313); and O. XXXI. expressly authorizes the judges to prune this luxuriance of pugnacity. One of the methods adopted is that which is illustrated by *Budden* v. *Wilkinson.* These cases were followed in *A.-G.* v. *Newcastle* (*Mayor*) ([1899] 2 Q. B. 478). This practice does not affect your right to require particulars of these documents: *Milbank* v. *M.* ([1900] 1 Ch. 376).

Representative action. O. XVI., r. 9.

"The rule as to representative suits remains very much as it was one hundred years ago." It was always "a simple rule resting merely upon convenience." "Given a common interest and a common grievance," one or two of an indefinite number of commoners, creditors, debenture holders, parishioners, shareholders, or market-gardeners were allowed to sue on behalf of all; and the judgment bound all. See Lord Macnaghten's speech in *Bedford* (*Duke of*) v. *Ellis* ([1901] A. C. 1)*. This was a case of representative plaintiff. In the *Taff Vale R.* v. *Amalgamated Soc. of R. Servants* ([1901] A. C. 426)* prominent trades unionists were held—on the same principle—to "represent" all the trades unionists in an action for an injunction against picketing; and the injunction was granted against the trades union as such, just as it would be granted against a partnership under its trade name. Lord Lindley observed that judgment for damages could be similarly obtained against a trades union so as to bind its funds; but in that case the trustees in whom the funds were vested would have to be included amongst the representative defendants. Lord Macnaghten and Lord Lindley's views were a necessary corollary from *Bedford* v. *Ellis;* but the arguments in the Courts below proceeded on a different line. See *ante,* p. 377 (10).

III. Procedure of Chancery Division runs in a separate groove.

III. The third class, where the procedure of the Chancery Division still runs in a separate groove, may be illustrated by summary procedure.

Summary proceedings in the various Divisions have with few exceptions run on parallel lines which never meet. Thus in the K. B. D. a single judge does not sit in Court to hear motions, and

Summary proceedings.

although originating summonses under special Acts, like the *M. W. P. Act*, s. 17, *Tasker* v. *T.* ([1895] P. D. 1), or even under the *Solicitors Act*, 1870, s. 8, *In re Howell Thomas* ([1893] 1 Q. B. 670), are made from time to time elsewhere than in the Ch. D., and although O. LIV. A authorizes any Division of the High Court to decide questions of construction of a document on originating summons, the wholesale substitution of this form of procedure for proceedings commenced in the ordinary way—by writ or petition—which has been the most remarkable feature in Chancery practice since the *J. Acts*, has found no counterpart in other Divisions of the High Court.

Conversely the Ch. D. will not grant a rule *nisi*, and has scarcely availed itself of the new summary procedure by O. III., r. 6, or by O. XIV., r. 1, which has revolutionized procedure in the K. B. D., although O. III., r. 6, includes liquidated demands in money arising upon a trust: *Hamilton* v. *Brogden* (60 L. J. Ch. 88). The reason of this is probably to be sought in history.

The principles of our common law have only been expanded in deference to those of law merchant, and O. XIV., r. 1, is directly borrowed from the *Summary Procedure on Bills of Exchange Act*, 1855 (18 & 19 Vict. c. 67). Similarly, "Bill of Exchange Procedure" (*Wechsel-prozess*) has been generalized in Modern Germany into one, but only one, of the main forms of summary procedure—"Bill of Exchange and formal Document (*Urkunden*) Procedure;" the definition of formal documents being sufficiently elastic to cover any contract-note signed by the contractor. Similarly, in Spain the "executive action" (*accion ejecutiva*) is a "Bill of Exchange and Formal Document Procedure," formal documents being used in a restricted sense. That is to say, in England and throughout Europe (for law merchant is international) laws have been put in force which throw the *onus* on defendant and not on plaintiff; these laws, however, presuppose some formality which is in itself a fair substitute for legal process; first, mercantile documents; then (as in Spain) public documents and the like; then (as in Germany) signed contracts; then (as in England) any contract for a definite amount. Now, equity, from the beginning to the end of its career, has protested against any and every formality; has violated the sanctity of deeds; has driven a coach and four through the *Statute of Frauds*, claiming to operate upon conscience; and therefore it could not join in the new movement without being false to its traditions. Perhaps this reasoning may be considered sentimental and historical, but it is difficult to see what other explanation is possible.

Summary of this concluding chapter.

To conclude, the effect of the Judicature Acts has been either to leave the Chancery Division and other Divisions to themselves, as heretofore; or to turn the Chancery Division into "predominant partner" whenever its inventions have been utilized; or in a few minor cases it has borrowed from its other partners, or *vice versâ*, with mutual acknowledgments and compliments, for which one must go to literature for a parallel. For it was thus that Dante in his Paradiso describes a great Dominican, St. Thomas Aquinas, singing the praises of the Franciscan methods, and a great Franciscan, St. Bonaventura, singing the praises of Dominican methods of procedure. But perhaps it is far-fetched to liken Sir G. Jessel to St. Thomas Aquinas, or Lord Esher to St. Bonaventura, or the Supreme Court of Judicature to Paradise.

TEMPLE

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